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R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED IN

THE COURT OF QUEEN'S BENCH,

AND

THE COURT OF EXCHEQUER CHAMBER

ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

BY

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

AND

COLIN BLACKBURN, OF THE INNER TEMPLE,

ESQES., BARRISTERS AT LAW.

VOL. II.

CONTAINING THE CASES DETERMINED IN PART OF EASTER TERM,
TRINITY TERM AND VACATION, AND MICHAELMAS TERM, 1853,
XVI. AND XVII. VICTORIA.

L O N D O N :

S. SWEET, 1, CHANCERY LANE, FLEET STREET.

Law Bookseller and Publisher.

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JUDGES
OF
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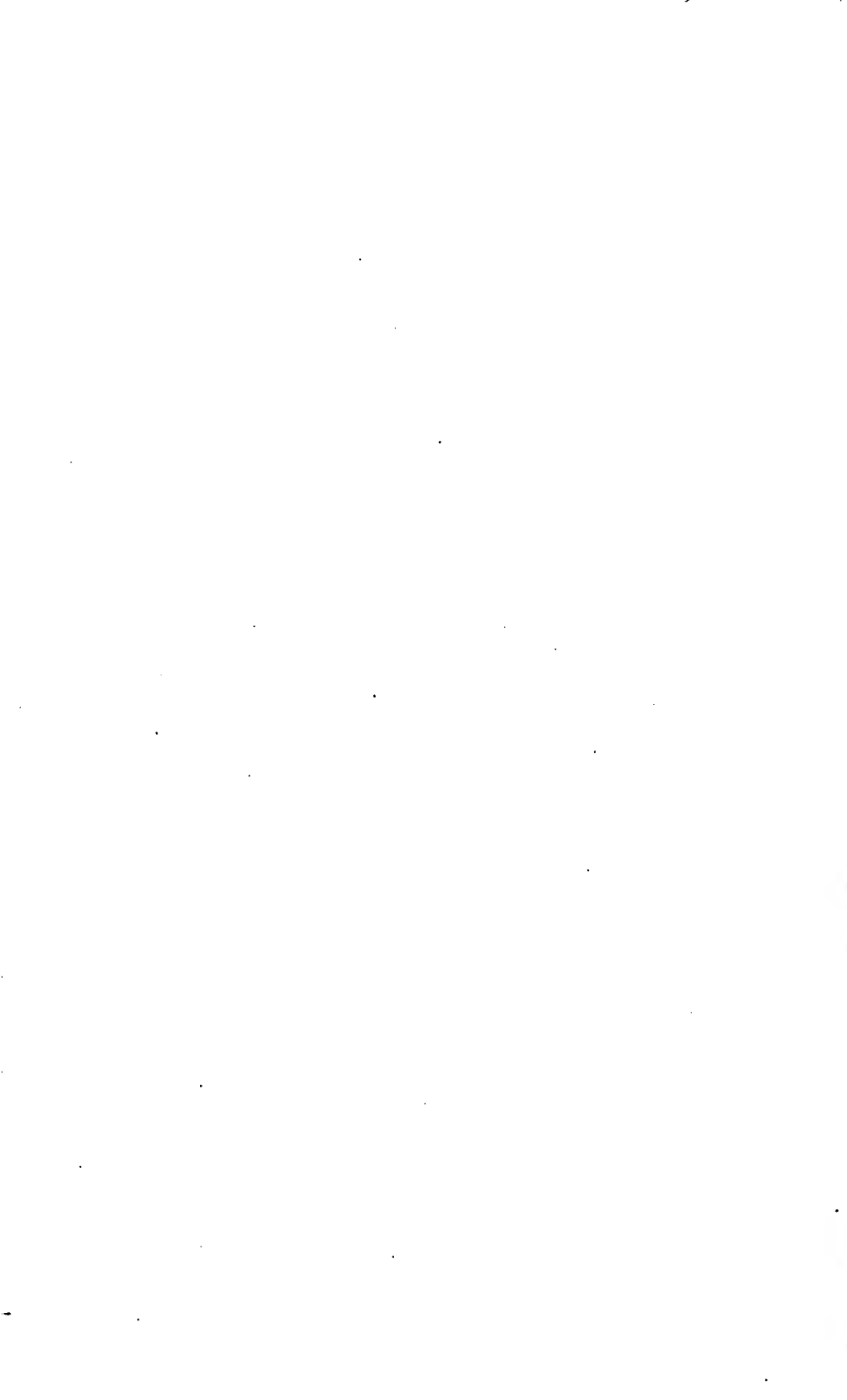
The Right Hon. JOHN Lord CAMPBELL, C. J.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.
Sir CHARLES CROMPTON, Knt.

ATTORNEY GENERAL.

Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITOR GENERAL.

Sir RICHARD BETHELL, Knt.



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ERRATA.

- Page 374.** marginal note, line 26, for the second "to" read "by."
466. marginal note, line 22, for "were traversed" read "was traversed."
580. marginal note, line 24, for "created by" read "created for."
613. note (d), 617, note (a), and 620, note (a), read "17 Q. B. 171."
683. note (b), and 685, note (b), read "17 Q. B. 127."
805. lines 14, 15, for "respondent" read "appellant."
823. marginal note, last line but seven, for "defendants" read "plaintiffs."
last line but two, for "their" read "the."
856. marginal note, last line but one, after "for" insert "breach of."

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XVI. VICTORIA.

The earlier cases decided in this term will be found in
vol. I.

ISAAC HOWARD *against* JOHN HUDSON.

Thursday,
April 28th.

TRESPASS, for that defendant assaulted plaintiff, and "imprisoned the plaintiff in the remand ward Trespass for imprisoning plaintiff in the remand ward in the Queen's

Prison. Plea: justification under ca. sa. at the suit of *W.*, to the sheriff of *Yorkshire*, under which plaintiff was arrested, and remained in the sheriff's custody, till he was brought up on habeas corpus and committed by order of a judge to defendant as keeper of the Queen's Prison, with the cause of his detention aforesaid. New assignment: That plaintiff, whilst in custody at *Y.*, petitioned the Court for the relief of Insolvent Debtors; that his petition was transmitted to the judge of the county court of *Y.*, who adjudicated that for fraud he should be remanded for one year from 12th *April* 1851, and then discharged: that the judge of the county court made a warrant, directed to the gaoler of *Y.*, ordering his discharge from the detainer of *W.* at that date; and that the warrant, as well as the detainer, was delivered to the defendant on plaintiff's committal: and plaintiff new assigned imprisonment after 12th *April* 1852. Plea: That defendant had not the warrant. Replication: That he had the warrant. Issue thereon.

On the trial it appeared that defendant had only a copy of the warrant; but the jury found that he led plaintiff to believe he had the original. It appeared that plaintiff was placed in the remand ward, and also that he had applied without success to a Judge, and to the Court for the relief of Insolvent Debtors, for a warrant addressed to defendant to

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authorize his discharge pursuant to the adjudication, and that he was detained three days after 12th April 1852.

Held: That there was nothing to preclude the defendant from shewing that his representation that he had the warrant was erroneous, as there was no evidence either that he intended plaintiff to act upon the faith of the representation, or that plaintiff did so act upon it to his prejudice; and that without both these ingredients there can be no conclusion by a representation.

Held, also, that plaintiff was not entitled to judgment non obstante veredicto, on the ground that the placing in remand ward was not justified, the place of custody not being the gist of the action, whether defendant's act in that respect was or was not justifiable.

Quære, whether the gaoler was bound to discharge plaintiff on notice of the adjudication, without a warrant to himself for his own protection.

of the Queen's Prison, and kept and detained him there for a long time, to wit" &c., "contrary to law and against the will" &c.

Plea: That *John Beaumont* sued out a ca. sa. from the Exchequer, directed to the sheriff of *Yorkshire*, against the now plaintiff, for a debt of 23*l.* 0*s.* 4*d.* and 9*l.* 4*s.* costs, under which plaintiff was arrested by the sheriff; and that *Christopher Nathaniel Wilson* sued out another ca. sa. out of the Exchequer, directed to the sheriff of *Yorkshire*, against the plaintiff for a debt of 200*l.*, and 8*l.* 4*s.* costs, under which also the sheriff detained plaintiff: that, whilst he was so detained, a writ of habeas corpus ad subjiciendum issued out of the Court of Queen's Bench, under which plaintiff was brought up from *York* to *London*; that, by an order of *Erle J.*, he was committed to the custody of the defendant as keeper of the Queen's Prison, with the causes of detention aforesaid; and so the plea justified the trespasses.

New assignment. That, whilst plaintiff was a prisoner at *York*, he petitioned the Court for the relief of Insolvent Debtors; and a vesting order was made on 12th April 1851. That plaintiff filed his schedule, describing therein, amongst other debts, those due to *Beaumont* and *Wilson*: that an order was made referring the petition to the county court of *Yorkshire*; and the petition was transmitted there: that the judge of that court made an adjudication, reciting that there appeared fraud on the part of plaintiff, and ordering that he should be entitled to the benefit of the Act and be discharged, as to the debts named in the schedule, in twelve

months from the date of the vesting order: and that a warrant to the gaoler of *York* issued under the hand of the judge, ordering that plaintiff should be discharged from the custody of the said gaoler as to the detainers of *Beaumont* and *Wilson* at the expiration of twelve calendar months to be computed from 12th *April* 1851; which was delivered to the gaoler of *York*: that the petition and other proceedings were returned to the Court for the relief of Insolvent Debtors. And that "the plaintiff was, by the said Sir *William Erle*, committed to the custody of the defendant with the said warrant as well as the said detainers, and was by the said sheriff delivered to the defendant with the said warrant as well as the said detainers." The plaintiff then new assigned imprisonment in the remand ward after 12th *April* 1852.

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Plea, to the New assignment: That the plaintiff was not committed by *Erle J.* with the said warrant as well as the said detainers, nor delivered to the defendant with the said warrant as well as the said detainers; and that defendant detained plaintiff during three days after 12th *April* 1852, and then discharged him; and that defendant never had the adjudication, or the warrant mentioned, or any warrant addressed to the defendant from any court: verification.

Replication: "That the plaintiff was, by the said Sir *William Erle*, committed to the custody of the defendant with the said warrant as well as the said detainers, and the plaintiff was delivered by the said sheriff to the defendant with the said warrant as well as the said detainers:" conclusion to the country. Issue thereon.

On the trial, before *Erle J.*, at the *Middlesex* sittings in

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last *Hilary* Term, it appeared that there was annexed to the return to the habeas corpus, mentioned in the pleadings, a copy of the warrant of the judge of the county court, addressed to the gaoler of *York* and authorizing him to discharge the plaintiff after 12th *April* 1852. On this copy was a certificate of the gaoler of *York* that it was a true copy. The original was not sent to *London*. An order of *Erle J.*, made on the 23d *July* 1851, was given in evidence. It was endorsed on the return to the habeas corpus; and it ordered that the plaintiff should be committed "to the custody of the keeper of the Queen's Prison in execution, with the causes within mentioned, there to remain until" &c. With this order the defendant received the certified copy of the warrant, still annexed to the return. The plaintiff was lodged in the remand ward, and treated in all respects as a remanded prisoner. The plaintiff, on 31st *March* 1852, applied to the defendant for the causes of his detention; he received a written statement which, after setting out the return by the sheriff of *Yorkshire* to the habeas corpus, and the order of *Erle J.*, stated that "annexed to the sheriff's return is a warrant of the judge of the county court of *Yorkshire* of which the following is a copy;" this was inaccurate, as in fact a copy only of the warrant was attached to the return, and that was copied in the statement of the causes of detention. The copy, however, contained in the statement furnished to the plaintiff, bore on the face of it a copy of the certificate of the gaoler of *York*, that it was a true copy of the original. The plaintiff, having obtained this statement of the causes of his detention, caused application to be made to *Martin B.* for an order to the

defendant to discharge him on 13th *April* when it should arrive. The plaintiff made this application on the ground that the warrant addressed to the gaoler at *York* was not sufficient to authorize the keeper of the Queen's Prison to discharge him; the practice in all such cases being to obtain a Judge's order. His application was refused. He then applied to the Court for the relief of Insolvent Debtors for a warrant, to the keeper of the Queen's Prison, to discharge him pursuant to the adjudication of the county court; but his application was refused (a). On 13th *April* the defendant refused to discharge the plaintiff, on the ground that his doing so without authority would make him liable to the detaining creditors: but finally he took this responsibility upon himself, and allowed plaintiff to depart on the 16th *April*.

The jury, in answer to questions from the learned Judge, said that the defendant never had the original warrant, but that he had acted as if he had it, and led the plaintiff to believe that he had it. The learned Judge thereupon directed a verdict for the defendant, giving leave to move to enter a verdict for the plaintiff, if the Court should be of opinion that the defendant was precluded from shewing that he never had the original.

Parry, in last *Hilary* Term, obtained a rule nisi to enter the verdict for plaintiff, or for judgment non obstante veredicto.

(a) It did not appear why the Court refused to interfere; but probably the Court doubted as to their jurisdiction over a petition which has once been referred to the judge of a county court. See *Regina v. Dowling*, May 9th, 1853. Post.

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Watson and Unthank (a) shewed cause. The question can hardly be understood without reference to the Acts under which an insolvent debtor, in custody under a ca. sa., is discharged pursuant to an adjudication. Stat. 1 & 2 Vict. c. 110. s. 83. enacted that, when an adjudication is made by the Court for the relief of Insolvent Debtors, or a commissioner thereof on his circuit, on the petition of an insolvent debtor, order shall be made according to it, "and the said court or commissioner shall also issue a warrant or warrants to the gaoler accordingly, ordering the discharge of such prisoner from custody as to the detainers under which he or she shall then be confined, or which shall be lodged against him or her before he or she shall be out of custody, the same being for debts in respect of which such adjudication shall have been made." The adjudication is in respect, not of all debts, but only of those mentioned in the schedule; *Leonard v. Baker* (b). If, therefore, the section had stopped here, the gaoler would have been obliged at his peril to enquire, in each case, whether the debt in respect of which the prisoner is detained was in the schedule. Sect. 83, to obviate this, has a proviso, "that in all cases the detainer or detainers, with respect to which any such prisoner shall have been adjudged to be discharged out of custody, he being then in custody thereupon, shall be specified in the warrant of the said court or commissioner, to be delivered to the gaoler in that behalf." And, by sect. 110, the gaoler is bound to obey, and is indemnified for obeying, any order of the court or of a commissioner. So that the object of the warrant is to protect the gaoler

(a) On the 25th April, before Lord Campbell C. J. and Erle J., and on this day before Lord Campbell C. J., Wightman, Erle and Crompton Js.

(b) 15 M. & W. 202.

who obeys the orders to him by discharging the prisoner, notwithstanding the detainers specified in the warrant. Then, by stat. 10 & 11 *Vict. c. 102. s. 10.*, the jurisdiction, formerly exercised by the commissioners of the Court for the relief of Insolvent Debtors on circuit, is given to the judge of the county court within whose district the insolvent debtor is in custody. In the present case, the plaintiff being an insolvent debtor in custody in *York*, his petition was properly sent to the judge of the county court of *Yorkshire* holden at *York*; and the judge, having adjudicated, made a warrant, which he directed to the gaoler of *York*, and which, as is stated in the pleadings, ordered that the plaintiff should be discharged from the custody of the gaoler of *York*, as to the detainers of *Beaumont* and *Wilson*, on the expiration of twelve calendar months to be computed from the 12th *April* 1851. Had the plaintiff, on the 13th *April* 1852, still been in the custody of the gaoler of *York*, there would have been no difficulty: the gaoler of *York* would have obeyed the order to him contained in the warrant; and, if either *Beaumont* or *Wilson* had brought an action for an escape, the gaoler of *York* would have been indemnified under stat. 1 & 2 *Vict. c. 110. s. 110.* But the plaintiff caused himself to be removed under habeas corpus from *York*; and he was committed to the custody of the defendant, the keeper of the Queen's Prison. Now no order had been addressed by any one to the keeper of the Queen's Prison. He never had the warrant of the judge of the county court of *Yorkshire*; but, if he had, it was a warrant to authorize the gaoler of *York* to discharge the plaintiff, not to authorize the keeper of the Queen's Prison to do so. The new assignment therefore is bad,

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as it shews an imprisonment justified by the detainers specified in the plea to the declaration, which detainers remained in force as far as the defendant was concerned. But the issue taken on these pleadings is, Whether the defendant had the original warrant: and, as he had not in fact, he is entitled to the verdict unless he is precluded from shewing that fact. The plaintiff, when the 13th April 1852 was approaching, applied to the defendant for a copy of the authority under which he was detained; and he received a copy of the return, and with it a copy of the warrant of the judge of the county court addressed to the gaoler of *York*, annexed to the return. On the face of the statement furnished to the plaintiff, this was a certified copy only; but, as the jury have found that the defendant led the plaintiff to believe that he had the original, it must now be taken as if it were a representation that the original warrant was annexed to the return. A representation, however, would not estop the defendant as against the plaintiff, unless it was made with intent to induce the plaintiff to act upon it, and he did so act; *Freeman v. Cooke* (a). Here there was neither an intent that he should act, nor an acting. The object for which the application was made is shewn by the conduct of the plaintiff. He knew that there would be a difficulty in getting his discharge from the custody of the keeper of the Queen's Prison, unless he could produce something to authorize that gaoler to discharge him; and that the warrant, addressed to the gaoler of another gaol, was not in practice considered a sufficient authority. He therefore applied for a Judge's order, which has commonly been made in such cases,

(a) 2 *Exch.* 654.

though it is difficult to see how a Judge has jurisdiction to make such an order; *Martin B.*, however, declined to interfere. Then the plaintiff applied to the Court for the relief of Insolvent Debtors, which refused to interfere. But these applications were not acts done in consequence of the representation that the defendant had the original warrant. They were steps taken by the plaintiff, because he supposed, and rightly, that, whether defendant had the original warrant or not, some further authority was requisite to secure the plaintiff's discharge on 13th *April*. Further, it is said that the defendant is estopped because he put the plaintiff in the remand ward. That was justified under stat. 11 & 12 *Vict. c. 7. s. 2.*; because there was an adjudication under stat. 1 & 2 *Vict. c. 110. ss. 77, 78, 96.* It was not material whether there was a warrant or not; and, a fortiori, it was immaterial whether the defendant had it or not. As to the motion for judgment non obstante veredicto; the plea justifies the imprisonment by shewing the writs of ca. sa.: and there is nothing afterwards pleaded to do away with their force. The placing in the remand ward was right; *Stead v. Anderson (a)*: but, if it were wrong, it is not made a substantial cause of action on these pleadings, as it was in *Cobbett v. Grey (b)*.

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Parry and Holl, in support of the rule. The defendant is estopped from denying that he had the original warrant. He is brought completely within the principle of *Pickard v. Sears (c)*, which has been carried further in *Gregg v. Wells (d)* and *Coles v. The Bank of England (e)*;

(a) 9 *Com. B.* 262.(b) 4 *Exch.* 729.(c) 6 *A. & E.* 469.(d) 10 *A. & E.* 90.(e) 10 *A. & E.* 437.

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and these cases were not overruled in *Freeman v. Cooke* (a). [Crompton J. There were some strong observations on *Coles v. The Bank of England* (b), in *Freeman v. Cooke* (c).] Unless the defendant had the original warrant he was not justified in putting the plaintiff in the remand ward; which is *prima facie* a trespass; *Cobbett v. Grey* (d).

Lord CAMPBELL C. J. I am of opinion that this rule must be discharged. It is quite clear that, if the truth may be admitted in evidence, the issue should be found for the defendant. But it is said that the defendant is estopped from giving the truth in evidence. Now I accede to the rule laid down in *Pickard v. Sears* (e) and in *Freeman v. Cooke* (a). If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must shew, both that there was a wilful intent to make him act on the faith of the representation, and that he did so act. Here the plaintiff fails in both. There was no wilful intent on the part of the defendant that the plaintiff should act on the faith of the representation; nor have I been able to perceive how in any way the plaintiff was prejudiced by the defendant's representation

(a) 2 *Exch.* 654.(b) 10 *A. & E.* 437.(c) 2 *Exch.* 660.(d) 4 *Exch.* 729.(e) 6 *A. & E.* 469.

that the original warrant was annexed to the return. The plaintiff neither did any act which, if he had not believed that the defendant had the original warrant, he would not have done, nor refrained from doing any act which, if he had known that the defendant had only a copy, he would have done. Therefore I think that the truth may in this case be admitted and the verdict found for the defendant. As to the motion for judgment non obstante veredicto, the ground urged upon us is that the plaintiff was placed in the remand ward. As to that, it is not here, as in *Cobbett v. Grey* (a), made a substantive complaint. This is a count for false imprisonment generally; and the place of imprisonment is not the gist of the action.

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WIGHTMAN J. I am of the same opinion. The only question on the first branch of the rule is, whether the defendant is precluded from shewing that he had not the original warrant. There is a striking distinction between this case and that of *Pickard v. Sears* (b), which is the authority chiefly relied on by the plaintiff. I agree with what is said in that case, that, "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And, as it is clear on the facts that the defendant never had the warrant, the question comes to be, Is he concluded from averring that? I prefer not to use the word estopped. Now it appears clear, on the

(a) 4 Exch. 729.

(b) 6 A. & E. 169.

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facts, that the representation, in the present case, was by no means made wilfully with the purpose of inducing the plaintiff to act, or to refrain from acting, so as to alter his position; and on that ground the rule should be discharged. As to the other branch of the rule, it seems clear that the putting of the plaintiff in the remand ward is not complained of as a substantive trespass.

ERLE J. The question of fact is, Whether the defendant had the original warrant? and it is clear he had not. But the question raised on the first branch of the rule is as to the doctrine in *Pickard v. Sears* (a). Did the defendant make a misrepresentation to the plaintiff with intent that the plaintiff should act upon it, and did the plaintiff, in consequence, so act upon it to his prejudice? The jury have found that the defendant acted as if he had the original, and led the plaintiff to believe he had it; so that there was a representation. But did the plaintiff alter his position for the worse in consequence of that representation? It is clear to my mind that, whether the original warrant, or a copy of it, was annexed to the return, the conduct of the defendant in putting the plaintiff in the remand ward would equally be justified. But the ground mainly relied on seems to be that the plaintiff supposed that the defendant had the original, and therefore lost time and money in applications to a Judge and to the Court for the relief of Insolvent Debtors. But, in fact, the ground of these applications was that the warrant was not a sufficient authority for the plaintiff's discharge. That was his contention before the Judge and the Court for

(a) 6 A. & E. 469.

the relief of Insolvent Debtors: so that it is clear that he did not make these applications in consequence of believing the representation that the defendant had the warrant, but notwithstanding that he believed that representation. As to the other branch of the rule, I concur with what has been already said.

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CROMPTON J. I think it would be very dangerous if we were to extend the principle by which a party is precluded from denying a representation to such a case as this. I do not think that an estoppel of this kind is always odious; in many cases I think it extremely equitable to act upon that doctrine. But I think that every case, in which we are to act upon it, must be brought within the principles so accurately laid down in the elaborate judgment in *Freeman v. Cooke* (a): and in the present case there is, on the finding of the jury, a want of the two great ingredients; for it is not found that the defendant intended that the plaintiff should act on the faith of the representation, nor that the plaintiff did so act. The word "wilfully," which is used in the judgment in *Pickard v. Sears* (b), has been well commented upon in the judgment in *Freeman v. Cooke* (a). As the rule is there explained, it takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not *malò animo*, or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way. That is the true criterion: and, as I said before, I think in the present case the two great ingredients are wanting.

Rule discharged.

(a) 2 *Exch.* 654.

(b) 6 *A. & E.* 469.

1853.

Friday,
April 29th.

WILLIAM PATRICK *against* WILLIAM PATRICK
RALSTON SHEDDEN.

S. raised an action against *P.* before the Lords of Session in Scotland, who dismissed the action, and found *P.* entitled to his expences. *S.* appealed to the House of Lords. Pending the appeal, *P.* petitioned the Lords of Session for decree and interim execution, under stat. 48 G. 3. c. 151. s. 17., for the expences. The Lords of Session allowed the decree, pronouncing an interlocutor and interim decree for payment, upon security to repay ("caution to repeat") in the event of a reversal of the original judgment in the House of Lords, with warrant, in failure of payment after a time named, to poind *S.*'s goods.

DECLARATION, dated 29th *November*, 1852, charged "that heretofore, to wit on the 3d day of *June* A. D. 1852, a certain decree was made and pronounced in and by the Court of our Lady the Queen before the Lords of Council and Session at *Edinburgh*, in that part of the United Kingdom called *Scotland*; whereby the said Lords did then decern and ordain the said defendant to make payment to the said plaintiff of the sum of 494*l.* 2*s.* 1*d.*, and also of the sum of 17*s.* 8*d.*, being the dues of extracting the said decree, which remains unsatisfied. And the plaintiff avers that he has done all things on his part to entitle him to receive payment of the said several sums of money. And the said plaintiff also sues the said defendant" &c. (for interest and on an account stated).

Pleas: 1. Never indebted. 2. That, before the commencement of this suit, and after the said decree was made and pronounced, an appeal from and against the said decree was duly entered and entertained by and before the House of Lords in the High Court of Parliament at *Westminster*; which appeal at the time of the commencement of this suit was, and now is, still pending

Security having been given, and the time having expired, *P.*, in this Court, sued for the amount of the expences.

Held: that the action was not maintainable, the decree for payment not being in the nature of a final judgment.

and undetermined; and by which it is prayed that the said decree may be reversed. And defendant further saith that, according to the law of *Scotland*, the said decree, and the defendant's liability to pay the said sums of money mentioned in the first count, before and at the time of the commencement of this suit were, and now are, during and by reason of the pendency of the said appeal, suspended; and the said decree became, and was and is, of no force or effect until the said decree hath been affirmed by the said High Court of Parliament; which has not yet been done. And the defendant saith &c.: allegation that the interest claimed was for alleged forbearance of the money decreed to be paid, and the account stated was of and concerning the same.

The plaintiff joined issue upon the pleas.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* sittings after last *Hilary* term, it appeared that the defendant had, as pursuer, raised actions of declarator, reduction, count and reckoning &c., before the Lords in Council and Session in *Scotland*, against the present plaintiff and one *Robert Shedden Patrick*, as defenders. On 10th *March* 1852, the Lords pronounced an interlocutor and decree, to the effect that the Lords sustained the defences pleaded by the defenders against the relevancy of the grounds of action set forth in the conjoined summons and supplementary summons of declarator, reduction, and count and reckoning, "dismiss the said actions, and assoilzie the defenders from the whole conclusions thereof, find the defenders entitled to their expences, appoint account of expences to be lodged, and remit to the auditor to tax the same and report." The expences were afterwards taxed by the auditor at 494*l.* 2*s.* 1*d.* The pursuer, the present defendant,

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presented a petition of appeal to the House of Lords, against the above judgment: and this petition was pending at the time of the present action. On 21st *May* 1852, the present plaintiff and *R. S. Patrick* presented a petition to the Lords of Council and Session, applying for decree and execution pending appeal (*a*), and praying their Lordships to approve of the auditor's reports on the accounts, and in terms thereof to modify the expences to the said taxed amounts reported by him, and to grant interim execution, and to allow decree, for the sums of 565*l.* 6*s.* 6*d.* (*b*) and 494*l.* 2*s.* 1*d.* of taxed expences, to go out, and be extracted in name of the petitioners respectively, and execution to proceed thereon, notwithstanding the appeal, to the effect of enabling them to recover payment of the said sums, with the

(*a*) Stat. 48 *G. 3. c.* 151., "concerning the administration of justice in *Scotland*, and concerning appeals to the House of Lords," enacts:

Sect. 17: "That when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents, before the Judges of the division to which the cause belongs; and the said division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession, or execution, and payment of costs and expences already incurred, according to their sound discretion, having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

Sect. 18: "That it shall not be competent by appeal to the House of Lords touching the regulations so made as to such interim possession, execution, and payment of expences or costs, to stop the execution of such regulations as shall have been so made as aforesaid respecting the same; provided that when the appeal touching the judgment or decree appealed from shall be heard, it shall be competent for the House of Lords to make such order and give such judgment respecting all matters whatsoever which shall have been done or have taken place in pursuance of or in consequence of such regulations so made as to interim possession, execution, and payment of expences or costs, as the justice of the case shall appear to the said House of Lords to require."

(*b*) This sum was claimed in respect of another action, the circumstances of which are not material to the present case.

expences of extract: and this, upon caution, in common form, to repeat the same in the event of the interlocutor being reversed in the House of Lords; and, further, to find the present defendant liable to the petitioners in the expences of that petition, and procedure thereon; or to do otherwise in the premises as to their Lordships might seem proper. This petition was answered on the part of the present defendant: and the following interlocutor was pronounced by the Lords of the First Division of the Court of Session:

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“Edinburgh, 3d June 1852.

“The Lords, having considered the petition” &c., “with the answers” &c., “and having heard the counsel for the parties, approve of the auditors’ reports,” &c., “drawn for the sums of 565*l.* 6*s.* 6*d.* and 494*l.* 2*s.* 1*d.*, and allow decree for the said sums to go out and be extracted in name of the petitioners respectively, and execution to proceed thereon, notwithstanding the appeal, to the effect of enabling the petitioners respectively to recover payment of the said sums, with the expences of extract, upon caution in common form to repeat the same, in the event of the interlocutor recited in the said petition being reversed in the House of Lords.”

The following is the Court of Session Extract of the interim decree for payment pronounced.

“At *Edinburgh*, the 3d day of *June*, 1852 years, sitting in judgment. The Lords of Council and Session decerned and ordained, and hereby decern and ordain, *William Patrick Ralston Shedden*, Esq., sometime residing” &c., “to make payment to *William Patrick*, of” &c., “of the sum of 494*l.* 2*s.* 1*d.*, being the taxed amount of expences to which he was found entitled on

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10th *March* last, in the conjoined original and supplementary actions of declarator, reduction, count and reckoning," &c., "now depending before the said Lords" &c.; "item of the sum of 17*s.* 8*d.*, being the dues of extracting this decree: And the said Lords grant warrant to messengers at arms, in her Majesty's name and authority, to charge the said pursuer personally, or at his dwelling place, if within *Scotland*; and, if furth thereof, by delivering a copy of charge at the office of the keeper of the record of edictal citations at *Edinburgh*, to make payment of the foresaid sum or sums of money, principal, interest, and expenses, and to implement and perform the hail foresaid obligations, all in terms, and to the effect contained in the decree and extract above written, and here referred to, and held as repeated brevittatis causâ. And that to the said *William Patrick*: if within *Scotland*, within fifteen days; if in *Orkney* or *Shetland*, within forty days; and, if furth of *Scotland*, within twenty one days, next after he is charged to that effect, under the pain of poinding and imprisonment; and also grant warrant to arrest the said *W. P. R. Shedden*, pursuer's, readiest goods, gear, debts and sums of money in payment and satisfaction of the said sum or sums, interest and expenses: And, if the said pursuer fail to obey the said charge, then to poind the said pursuer's readiest goods, gear and other effects. And, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs. Extracted upon this and the preceding page" &c.

It was proved that caution had been given, in compliance with the condition of the interlocutor of *June* 3*d*, 1852, and that the defendant, in *July* 1852, was charged to make payment.

The counsel for the plaintiff contended that he was entitled to a verdict on the second issue, inasmuch as the decree, from which there was the appeal to the House of Lords, was not the decree mentioned in the declaration (a). The counsel for the defendant contended that the action was not maintainable, inasmuch as the interlocutor and decree of 3d June 1852 were not final. The Lord Chief Justice directed a verdict for the plaintiff, reserving leave to move for a nonsuit.

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In this Term, *Montagu Smith* obtained a rule accordingly.

Crowder and *Bovill* now shewed cause. The interim decree of 3d June 1852 is not a merely interlocutory proceeding. Nothing more was to be done in the *Scotch* proceeding, except the actual execution. Had it been possible, in fact, to arrest the defendant in *Scotland*, such arrest would have been valid. Sect. 17 of stat. 48 G. 3. c. 151. enables the *Scotch* Judges to regulate all matters relative to interim possession, or execution, and payment of the costs and expences already incurred, according to their sound discretion. They have done so; and they are now functi officio; and the proceeding, so far as regards the money now claimed, is final. By sect. 18, the appeal to the House of Lords does not stop the execution of these regulations. That, generally, an action may be maintained in the Courts of this country for money ordered, by the *Scotch* Court, to be paid in respect of costs, appears from *Russell v. Smith* (b). But

(a) No further discussion on this point took place.

(b) 9 M. & W. 810.

1853. this rule was obtained on the authority of *Paul v. Roy* (a). In that case the Master of the Rolls, premising that the *English* Courts of Equity would enforce a decree of the *Scotch* Courts, if final, held that the decree was there only interlocutory: but there the proceedings in the *Scotch* Courts were not terminated, and the decree in question was merely a step in the cause: the decree was for depositing money in a bank by persons not parties to the principal cause; and the ultimate right to the money was not decided upon. The *Scotch* Court, in the present case, might have ordered the payment to be made instantly and unconditionally: they do make the order subject (according to the interlocutor of 3d June 1852) to the condition of caution being given, and naming a certain time: the caution having been given, and the time having expired, the case is as if the order had been for immediate payment, or as if the appeal to the House of Lords had been abandoned, in which case no caution would have been required. It is true that, under sect. 18, it will be competent to the House of Lords to give a judgment affecting or varying these regulations: but any judgment to that effect would be merely analogous to a writ of restitution in our Courts: the previous proceeding could not be the less final. A judgment in the Court of Queen's Bench is, properly speaking, final, though error may be brought upon it: and, if bail in error be not put in, and execution issue upon the judgment, the writ of error does not prevent such execution from being final: all that can be done is to have a writ of restitution. The word "interim," in sect. 17, applies to "possession" only: and, even

(a) 21 L. J. N. S. Chanc. 361. (February 11 and 12, 1852.).

if it applies also to "execution, and payment," it does not mean interlocutory, or temporary, but is rather used to exclude the idea of the proceeding being suspended by the appeal: it means that, in spite of and pending the appeal, the costs may be ordered to be paid in the time intervening between the order and the determination of the appeal.

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Sir *F. Kelly* and *Montagu Smith* (with whom was *Prentice*), contra. The regulations made under sect. 17 appear, both from their nature and from the language of the section, to be merely interlocutory; and therefore no action can be maintained upon them; *Emerson v. Lashley* (a), in which case an action on the judgment itself would have been maintainable. The regulation here is more analogous to a rule of our Courts than to a judgment; the order might have been, if the Court had thought fit, to pay the money into Court. In *Berkeley v. Elderskin* (b) this Court held that an action does not lie in this Court upon the judgment of a county court: and the decision proceeded partly on the ground that sects. 96, 99 of stat. 9 & 10 *Vict. c. 95*. provide a peculiar mode of execution, and also, to a great extent, upon sect. 100, which enables the judge of the county court to rescind or alter his order. Here the order may be varied by the House of Lords, under sect. 18 of stat. 48 *G. 3. c. 151*. (*Montagu Smith* was stopped by the Court.)

LORD CAMPBELL C. J. I think this action is not maintainable. Before stat. 48 *G. 3. c. 151*. there could not be execution on a *Scotch* judgment pending an

(a) 2 *H. BL.* 248.(b) 1 *E. & B.* 805.

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appeal to the House of Lords. That Act makes provision for execution pending the appeal, and no more. Here the order is made, directing money to be paid for costs, and execution to issue for such money, but only after caution given. That does not create a right of bringing an action in this Court for the money, there being an appeal from the judgment in the cause itself. The only result is that execution may be taken out at the time designated by the order: and the terms of the order may be varied by the *Scotch* Court, which retains this power down to the time of the determination of the appeal in the House of Lords. That is surely not an order final in the sense in which an order must be final upon which an action is to be maintained. The rule therefore must be made absolute.

WIGHTMAN J. It is admitted that the action cannot be maintained unless the order was final: and I think that clearly it was not final. The very word "interim," in sect. 17, shews that the order is no more than an interim proceeding to regulate the payment of costs, pending the appeal in the House of Lords. The judgment in the cause may be affirmed or reversed: in the meantime the result is uncertain. The *Scotch* Court has power to regulate all matters relating (among other things) to costs, during the interval. If we look at the order, it clearly treats the payment as not to be made or enforced finally till the appeal is determined, though execution may issue in the meantime.

CROMPTON J. (a). I am of the same opinion. All

(a) *Erle* J. was absent.

proceedings in the decree in the cause itself would be stopped by the appeal: but, by the statute, execution is allowed to go in the mean while. That result is the whole effect. The right to claim costs flows out of the decree which is stopped: and then this order gives the party nevertheless the power of obtaining the costs by an execution which is subject to the result of the appeal.

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Rule absolute.

ROBERT ATTWOOLL *against* ABEL ATTWOOLL.

Friday,
April 29th.

COUNT, on a bond in the penal sum of 100*l*., subject to a condition, whereby, after reciting that the defendant and the plaintiff had for some time past been joint owners of a ship called *The Rebecca*, and that by deed, bearing even date therewith, the plaintiff had assigned all his share in the said ship or vessel unto the defendant, and that it had been agreed that the defendant should execute the said bond with a condition for making void the same as thereunder written, the condition of the said bond was declared to be, that, if the defendant should discharge, and at all times keep harmless and indemnified, the plaintiff of and from all debts which then were or might be due to any persons for, or on account of, or in respect of, the said ship or vessel, and of and from and against all suits, costs and damages which might be commenced against him, the

Count on a bond for 100*l*., conditioned to indemnify plaintiff against certain actions: breach, that plaintiff was sued on one of them, and obliged to pay 9*l*. 10*s*. 5*d*., and was not indemnified. Plea: Set-off of an amount averred to be equal to plaintiff's claim; but the plea did not shew what amount was due on the bond. Demurrer.

Held: that set-off could not be pleaded to a bond conditioned for

indemnity: and that a plea of set-off to a bond, under stat. 8 G. 2. c. 24. s. 5., is not good, unless it shews what amount is justly due on the bond: and that for both reasons the plea was bad.

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plaintiff, as part owner as aforesaid, or which he might sustain or be put into by reason of the said debts, or any of them, then the said bond was to be void. Averment, that, at the date of the said bond, there was due a certain debt of 7*l.* 3*s.* 9*d.* in respect of the said ship, which was sued for against the now plaintiff in the county court of *Devonshire*, holden at *East Stonehouse*, and recovered, together with costs of suit amounting to 2*l.* 5*s.* 2*d.*, making together 9*l.* 8*s.* 11*d.*; which the now plaintiff was by the said County Court ordered to pay to the clerk of the said Court, and which said sum of 9*l.* 8*s.* 11*d.* the now plaintiff was forced and obliged to and did accordingly pay to the said clerk of the Court, together with 1*s.* 6*d.* fee for paying into Court; of which premises the defendant always had notice: yet the defendant has not kept harmless or indemnified the plaintiff of or from the said debt, or of or from the said action so commenced and prosecuted against the now plaintiff, or of or from the costs, charges or damages which he has sustained and been put as aforesaid to by reason of the said debt as aforesaid: whereby the said bond has become forfeited. And the plaintiff claims the sum of 100*l.*

Plea: That the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's claim, for and in respect of a bill of exchange for 20*l.*, drawn by the defendant on the plaintiff, which said bill the plaintiff accepted, but did not pay the same; and for money payable by the plaintiff to the defendant for money lent by the defendant to the plaintiff; and for money paid by the defendant for the plaintiff; and for money found to be due from the plaintiff to the defendant on accounts

stated between them: and which amount the defendant is willing to set off against the plaintiff's claim.

Demurrer. Joinder.

The demurrer was argued in this term (a).

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Archibald, for the plaintiff. The bond is not given to secure a debt. It is conditioned to indemnify the plaintiff against unliquidated demands; and it is clear that, if this, instead of being an action on a bond, were an action on a contract to indemnify, a set-off could not be pleaded; *Hardcastle v. Netherwood* (b). Set-off to bonds is given by stat. 8 G. 2. c. 24. s. 5. It is, however, confined to cases in which there is a debt, or contract to which, if there was no penalty, a set-off might be pleaded; *Hutchinson v. Sturges* (c). And this plea does not shew how much is justly and truly due on either side. That is essential; *Symmons v. Knox* (d), *Grimwood v. Barrüt* (e), *Bell v. Shaw* (g).

Maude, contra. The count shews the amount justly due; and therefore the omission of such an averment in the plea is not a defect in substance. The statute gives a set-off against a bond, although it is conditioned to secure the payment of what is not a debt. In *Collins v. Collins* (h) the condition was to pay an annuity and maintain the plaintiff; and yet a set-off was allowed to a breach for non payment of the annuity. [Crompton J. I never could understand how, if such a case was

(a) April 22d. Before Lord Campbell C. J., *Wightman* and *Crompton* Js.

(b) 5 B. & Ald. 93.

(d) 3 T. R. 65.

(g) Holt. N. P. C. 292.

(c) *Willes*, 261.

(e) 6 T. R. 460.

(h) 2 Burr. 820.

1853. within stat. 8 G. 2. c. 24., the judgment could be entered, so as to permit the penalty to stand as a security for future breaches. The question was asked in *Collins v. Collins* (a); and Lord *Mansfield* answered it; but I never could understand the answer.]

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Archibald was heard in reply.

Cur. adv. vult.

LORD CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that in this case the plea is bad both in substance and in form. If the plaintiff owes the defendant, on a bill of exchange, more than 9*l.* 8*s.* 11*d.*, the sum claimed as due from the defendant to the plaintiff on this bond, it is very much to be regretted that the defendant should be without defence, and should be driven to bring a cross action. But so the law at present is. The condition of the bond, when examined, shews that it is to indemnify generally, and not for the payment of any liquidated demand: and, according to the cases cited, there can be no set-off pleaded in an action on such a bond. We not do think it necessary to comment upon these cases; as we hope that the Legislature may speedily interfere to allow justice to be finally done between such parties in a single action. In the present case, the plea, which could only be supported under stat. 8 G. 2. c. 24. s. 5., is likewise defective in not shewing, as required, "how much is truly and justly due on either side." We must therefore give

Judgment for the plaintiff.

(a) 2 Burr. 820. 826.

1853.

THOMAS FOSTER *against* THOMAS HAYES and
JOHN PIERSON, Senior.

Friday,
April 29th.

REPLEVIN. Avowry and cognizance : That one *William Harding*, being seised in fee of certain premises, and, amongst others, of the farm where the distress was taken, made his will on the 8th *January* 1788. The will was then set out at length. By it the testator devised to his nephew *Robert Kitchen*, and his heirs, certain real estate (not including the farm on which the distress was taken), and devised certain other real estate, including the farm on which the distress was taken, to trustees, upon trust, during the time that testator's grandson *Matthew Hayes* should be under the age of twenty one years, to receive the profits and accumulate them, and, on his attaining the age of twenty one, upon trust for him for life ; and after his decease to the use of his children, as he might appoint ; and, in default of appointment, " to the use of all the children, both sons and daughters, of the body of the said *Matthew Hayes* lawfully issuing, equally to be divided amongst

A. by his will, made in 1788, devised *Black-acre* to trustees to the use of his grandson *M.* for life, remainder to the use of *M.*'s children as he might appoint, and, in default of appointment, " to the use of all the children, both sons and daughters, of the body of the said *M.* lawfully issuing, equally to be divided amongst them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever ; and, for default of such issue, to the use of all the children of

my brothers and sister, equally to be divided amongst them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever." He then devised *Greenacre* to the use of his grandson *W.* for life, with limitations over expressed in the same terms. Then followed a proviso, " in case either of my said grandsons shall happen to die without issue of their bodies lawfully begotten, that my said trustees shall stand seised of the several hereditaments and estates hereinbefore devised for the benefit of such grandson so dying to, for and upon the like uses and trusts as they shall stand seised of the hereditaments and estates before devised for the benefit of such survivor." At the time the will was made, the testator had two infant grandchildren *M.* and *W.*, and several nephews. *M.* and *W.* both survived him. *M.* had one child *E.*, a daughter, who died in his lifetime, an infant, before stat. 3 & 4 *W.* 4. c. 106., leaving defendant *E.*'s cousin and heir at law. *W.* died without ever having had issue. Then *M.* died. The defendant, who was not a child of a brother or sister of the testator, or heir of such child, claimed *Blackacre*, as heir at law of *E.* The nephews also claimed it.

Held, that *E.* on her birth took a vested remainder in fee in *Blackacre*, which on her death descended to defendant.

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HAYES.

them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever; and, for default of such issue, to the use of all the children, both sons and daughters, of my brothers and sister, equally to be divided amongst them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever." He then devised other real estate to the same trustees, with similar limitations for the benefit of his grandson *William Harding Hayes*, and with a devise over in the same words. Then followed this proviso. "Provided always, and my will and mind expressly is, that, in case either of my said grandsons shall happen to die without issue of their bodies lawfully begotten, that my said trustees shall stand seised of the several hereditaments and estates hereinbefore devised for the benefit of such grandson so dying, to, for and upon the like uses and trusts as they shall stand seised of the hereditaments and estates before devised for the benefit of such survivor." These were averments that the testator died seised; that *Matthew Hayes* survived him, attained twenty one in 1814, married, and had an only child, *Elizabeth Harding Hayes*, who died an infant, in her father's lifetime, before the passing of stat. 3 & 4 W. 4. c. 106., leaving *Thomas Hayes*, the avowant, her cousin and heir at law: that *Matthew Hayes* demised the farm in question to the plaintiff, at a rent of 93*l.* payable half yearly, and then died between two days of payment, and the current half year's rent afterwards became due; and that the avowant *Thomas Hayes* became, as heir of *Elizabeth Harding Hayes*, entitled to the reversion in fee in possession; and that the rent for the last half year was apportioned. He then avowed, and the other defendant

made cognizance, for a distress for the apportionment of the rent in the half year during which *Matthew Hayes* died. Demurrer. Joinder.

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Plea 3 to the avowry and cognizance: That *Elizabeth Harding Hayes* died an infant unmarried, of the age of two weeks. That *William Harding Hayes* the devisee, grandson of the testator, died after the testator and before *Matthew Hayes*, without ever having had issue. That, at the time of making his will, the testator had then living two brothers, *Henry* and *Robert*, and one sister, *Isabel*, who had then several children of whom some still survive. And that *Thomas Hayes*, the avowant, is not one of such children, nor the heir of one; and that the said children surviving, and the heirs and devisees of those dead, claim the rent from plaintiff. Demurrer. Joinder.

The case was argued in this term (a).

Cowling, for the plaintiff. The question is, whether, on the construction of *William Harding's* will, *Elizabeth Harding Hayes* took, as soon as she was born, a vested estate in fee. If so, *Thomas Hayes* as her heir at law is entitled to the estate; if not, he has no title. The whole question therefore turns on the construction of the will. It appears that, at the time when the will was executed, the testator had two grandsons who were the principal objects of his bounty, and two brothers and a sister whose families were the secondary objects of his bounty. The devise, had it stopped short just before the proviso, would have been a devise of one estate to one grandson for life, with remainder to the use of the children of that

(a) April 26th. Before Lord Campbell C. J., *Wightman*, *Erle* and *Crompton* Js.

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grandson and their heirs; and, in default of such issue, to the children of his brothers and sister: and a similar devise of another estate to the other grandson. If the effect of this was a contingent fee to the unborn children of the grandson, then, on the birth and death of an infant, the estate passed away from the children of the brothers and sister to a person not the object of the testator's bounty. He certainly cannot have intended that: and his real intention would be fulfilled if the grandson took an estate in tail. And this intention is made more clear by the proviso which gives the estate of each grandson, in case he shall die without issue, to the other. It has long been settled that, in wills executed before stat. 7 W. 4 & 1 Vict. c. 26., the words "die without issue" *prima facie* mean die after an indefinite failure of issue. The context may indeed shew in some cases that the phrase is used in a different sense. Thus in *Doe dem. Comberbach v. Perryn* (a) the devise was to the testator's niece for life, remainder to all and every her children by her husband *James*, "and their heirs for ever, to be equally divided between and among such children (if more than one) share and share alike; but if only one child, then to such only child and his or her heirs for ever; and for default of such issue," to his niece's husband *James*. It was held in that case that "default of such issue" did not mean after a failure of issue of the niece, but in case there are no such children. The person, however, in whose favour the devise over was there made, could not be an heir of his own children; so that there was no incongruity in a devise to him in default of their heirs; and this fact forms the distinction between that case and

(a) 3 T. R. 484.

Ives v. Legge (a), which is expressly recognised in *Doe dem. Comberbach v. Perryn* (b). The decision in *Ives v. Legge* (a) was that, wherever after a devise to children and their heirs there comes a devise, introduced by the words in default of issue or similar words, to a person who would himself be one of the heirs of the children, so that it would be impossible that the devise to him should ever take effect if it was only to be in default of their heirs general, the words shall be construed to mean heirs of the body. There are many cases where words which would *primâ facie* give an estate in fee are cut down in this manner by a subsequent limitation, so as only to give an estate tail; *Doe dem. Bean v. Halley* (c), *Brice v. Smith* (d), *Lewis dem. Ormond v. Waters* (e), *Doe dem. Jearrad v. Bannister* (g). In the present case, if the will had stopped at the end of the devise to the children of the testator's brothers, after the devise to his grandson's children and their heirs, it would be an argument that the words "in default of such issue" gave an estate tail to the grandsons; but the proviso shews the intention clearly.

Rudall, *contra*. The grandsons took an estate for life, remainder to their children in fee; and, if there never were such children, then there is a devise over. The authorities are very numerous to shew that, after a devise to children and their heirs, the words in "default of such issue" mean if there are no such children;

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(a) 3 T. R. 488, note (a).

(b) 3 T. R. 484.

(c) 8 T. R. 5.

(d) *Willes*, 1.(e) 6 *East*, 336.(g) 7 *M. & W.* 292.

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Rex v. The Marquis of Stafford (a) is a leading case. Then there are many cases which shew that the words in the proviso "die without issue," when following a devise to children and their heirs, mean "die without having had issue;" such are *Ginger dem. White v. White* (b), *Malcolm v. Taylor* (c). In *Goodright dem. Docking v. Dunham* (d) the devise over was to a relative; yet the argument now used was never thought of. There is another class of cases which establish that, where there is a devise to A. for life, remainder to his unborn sons in tail male, remainder to his daughters in fee, and, in default of issue of A., a devise over, the words "default of issue" shall not be construed to give an estate tail in general, but shall mean, if there are no such issue. These cases were all reviewed and confirmed in *Baker v. Tucker* (e). All these cases shew that both in the devise and in the proviso the words in default of issue must mean "in case my grandson never has such issue."

Cowling, in reply. The construction contended for by the defendants makes all the estates in remainder contingent.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that, under the will of *Wm. Harding, Elizabeth Harding Hayes*, on her birth, took a vested remainder in fee in the lands in question,

(a) 7 *East*, 521.

(b) *Willes*, 348.

(c) 2 *Russ. & M.* 416.

(d) 1 *Doug.* 264.

(e) 3 *H. L. Ca.* 106.

subject to the life estate of her father *Matthew Hayes*. There seems to us to be no doubt whatever that this would be the effect of the limitations in favour of *Matthew* and his children, irrespective of the proviso, which is mainly relied upon by the counsel for the plaintiff. No words could have been employed better adapted for that purpose than those found in the will, down to the limitation in favour of the sons and daughters of the testator's brothers and sister, "for default of such issue:" and "for default of such issue," according to various authorities which were cited, must mean "for default of *Matthew* having had no child in whom the remainder in fee should vest." The doctrine on which this construction rests is confirmed by the first case which Mr. *Cowling* cited to bring it into doubt, *Doe dem. Comberbach v. Perryn* (a), and is quite consistent with his second, an antecedent case, *Ives v. Legge* (b); for there the words to be construed are essentially different. We must therefore come to the effect of the proviso: and we think that Mr. *Cowling* made out the rule of construction for which he contended, that, although there be a limitation in a will in which taken by itself the word "heirs" must be construed to mean *heirs general*, and to give a fee simple, if there be a subsequent limitation in the will which can have no operation if this effect is given to the word "heirs," it shall mean *heirs of the body* and cut down the prior gift to an estate tail. But here the limitations which follow the proviso may take effect although the contingency should be considered to be

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(a) 3 T. R. 484.

(b) 3 T. R. 488. note (a).

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that the grandsons shall die without having had children. On this supposition, the other objects of the testator's bounty would have a somewhat less chance of being benefitted than if the remainder had been cut down to an estate tail; but they would have been entitled to take in default of the grandsons never having had any children: and, as the estate tail might have been barred by a recovery, the practical difference is not very important. The proviso uses the expression "in case either of my said grandsons shall happen to die *without issue of their bodies* lawfully begotten:" but we think this must mean *such issue* as is before specified, and, introducing no devise inconsistent with the prior gift to the children of the grandsons and their heirs, leaves the remainder in fee simple to vest in the child of the grandson on its birth. This being the plain intention of the testator, and consistent with all the authorities cited, we give

Judgment for the defendants.

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IN THE EXCHEQUER CHAMBER.

Friday,
April 29th.

(Error from the Queen's Bench.)

WILLIAM SMITH *against* HERBERT HARRIS
CANNAN and ROBERT BEVAN, Assignees of
GEORGE GARNHAM, a Bankrupt.

TROVER by defendants in error, plaintiffs below, assignees of *Garnham*, a bankrupt. There were two counts, one laying the conversion before and the other after the bankruptcy.

Pleas: Not guilty; Not possessed. Issues thereon.

At the trial, before *Adams* Serjt., at the *Bury* Spring assizes, 1852, the verdict passed for the plaintiffs below, defendants in error, on all the issues, subject to a bill of exceptions. Error was now brought. The bill of exceptions set out the evidence given at the trial, consisting mainly of admissions. The material facts were

G., a farmer, conveyed all his farming stock and goods to *S.* by bill of sale, by way of security for about 900*l.*, with a power of sale. The property comprised in the bill of sale was of about the value of 2,800*l.*; and there was a trust for *G.* of the surplus of the property comprehended

in the bill of sale, which was the whole of *G.*'s property, with the exception of two shares in a joint stock bank, of the value of 17*l.* 10*s.* each. *S.* seized and sold enough of the stock to pay the amount secured. *G.* was declared a bankrupt, as a banker. The bill of sale was *bonâ fide* given under pressure; and the trade of the bank was not affected by giving it. On trover by *G.*'s assignees against *S.*, issues being joined on pleas of Not guilty and Not possessed, and the Judge at Nisi prius having ruled that these facts were evidence on which the jury might find a verdict for the plaintiff:

Held, by the Exchequer Chamber, on a bill of exceptions, that the necessary consequence of an assignment of what is substantially all the trader's property is to delay his creditors, and that the existence of a resulting trust, and of a substantial surplus, does not prevent its having that effect; and that a conveyance necessarily delaying a trader's creditors is an act of bankruptcy, though it has not the effect of stopping his trade; and that a transaction, being itself an act of bankruptcy, is not protected, though made with a party who has no notice of the circumstances making it an act of bankruptcy; and consequently that the facts in this case were evidence on which the jury might find for the plaintiffs, and the direction was therefore right.

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these. *Garnham* was a farmer: *Smith* was his creditor, to the amount of 240*L*, and was also his surety to a bank to the amount of 700*L*. *Garnham*, under pressure from *Smith*, bonâ fide executed, on 7th *February* 1851, a bill of sale. By this he conveyed to *Smith*, by way of security for the debt of 240*L*, and indemnity against loss on the guarantee for 700*L*, all his household goods, crops, farming stock and effects then being upon his farm, or which should or might be or be growing thereafter in or upon the same, by way of mortgage; with a power, on default of payment, and notice given by *Smith* in writing, for *Smith* to seize and sell the same, and out of the moneys to pay himself and the debt for which he was surety, pay the expences of sale, &c., and "render to and account for the surplus (if any) of the said money arising from such sale or sales as aforesaid unto the said *George Garnham*, his executors, administrators or assigns." Notice was given; and, on 22d *February* 1851, *Smith* seized and sold stock and goods of sufficient value to pay his own debt and discharge the debt for which he was surety, and pay the costs of the sale, amounting in the whole to 988*L* 1*s*. 10*d*. This was the conversion complained of.

It appeared that, at and before the time when the bill of sale was executed, *Garnham* was indebted to various parties, to the amount in the whole of about 7,000*L*. The property comprised in the bill of sale was of the value of about 2,800*L*, being about three times the amount for which it was a security. The bill of sale comprised the whole of *Garnham*'s property, except the equity of redemption of some real estate mortgaged to beyond its value, and two 20*L* shares in a joint stock bank, then of the value of 17*L*. 10*s*. each. It was not

known to *Garnham's* creditors that he possessed these shares; and they all dealt with him as a farmer, and not as a banker. He was, on 27th *March* 1851, adjudged a bankrupt, on a petition of 24th *March*, 1851.● The sufficiency of the petitioning creditor's debt, and the trading of *Garnham*, as a banker, were admitted: and it was also admitted that the business of the joint stock bank in question was not affected by the bill of sale executed by *Garnham*.

The learned Serjeant ruled that these facts were evidence on which the jury might find for the plaintiffs below: on which ruling the exception was tendered.

Worlledge, for the plaintiff in error (defendant below). The assignment by *Garnham* of his farm stock is admitted to be a bona fide conveyance, and cannot be impeached except on the ground that it was an act of bankruptcy. Now *Garnham* was only a trader in respect of the two shares which made him a banker: those two shares are not included in the assignment; he was not disabled from carrying on his trade as a banker; for he assigned away no part of his stock in trade; and in fact the business of the bank went on as before. [*Parke* B. The question raised on this point is, What is the definition of the transfer of the whole, or nearly the whole, of a trader's goods which constitutes an act of bankruptcy? In the present case the conveyance was not fraudulent in fact; the trade was not stopped; nor were the trade creditors delayed. If, therefore, it is an essential ingredient in the definition of such an act of bankruptcy that the conveyance should be such as necessarily to have the effect of stopping the trade, the plaintiff in error is entitled to succeed. The

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words of stat. 12 & 13 *Vict. c. 106. s. 67.*, which do not in this respect differ from those of the former bankrupt Acts, are, "That if any trader liable to become bankrupt" "make or cause to be made," "any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels," every such trader making such a deed, "with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." Do you say that creditors in that enactment means trade creditors?] The assignment of so much of a trader's effects as disables him from carrying on his trade, though not fraudulent in the proper sense of the word, is held to be fraudulent within the meaning of the bankrupt laws. But the cases are confined to assignments disabling the trader from carrying on his trade. In *Compton v. Bedford* (a) Lord Mansfield says: "The interest, which is omitted in the assignment, is too minute to make a difference. The assignor has given up all his power of trading, for the future." In the present case the reservation, though minute, is not too minute to make the difference. *Garnham* reserved enough to enable him to carry on the very slight trade in respect to which alone he was liable to the bankrupt laws. In *Law v. Skinner* (b) *De Grey* C. J. says: "It is an assignment of all his stock in trade, without which he can carry on no business." In *Baxter v. Pritchard* (c) Lord Denman C. J., referring to these cases and to *Hassells v. Simpson* (d), *Butcher v. Easto* (e), *Devon v. Watts* (g) and *Worseley v. Demattos* (h), says that in

(a) 1 *W. Bl.* 362.(b) 2 *W. Bl.* 996.(c) 1 *A. & E.* 456, 462.(d) 1 *Doug.* 89 n. [† 39].(e) 1 *Doug.* 295.(g) 1 *Doug.* 86.(h) 1 *Burr.* 467.

those cases "Lord *Mansfield*, and other contemporary Judges of high authority, appear to have held, that the mere assignment of a trader's whole property by deed was an act of bankruptcy, as disabling him from further carrying on his trade, though for a good consideration, and even with the praiseworthy motive of fairly distributing it among his creditors." In *Carr v. Burdiss* (a) *Parke* B. says: "In order to render an assignment of a trader's effects an act of bankruptcy, it must be shewn that the party assigned all, or so nearly all of his effects, as to put it out of his power to carry on the trade." In *Wedge v. Newlyn* (b) the question left to the jury was whether the trader by the instrument conveyed away so much of his property as to incapacitate himself from carrying on his business by the insolvency which would ensue. Similar language is used in *Siebert v. Spooner* (c). There is a further point in the present case. The assignment is by way of security only; and there is an express resulting trust for the benefit of *Garnham*. And, as the surplus is here substantial, amounting to two thirds of the value, this cannot be taken as an assignment of all the trader's effects. It is true that the equitable interest could not be taken in execution under a *fi. fa.*; *Scott v. Scholey* (d); but a creditor could take it in equity; *Greenwood v. Churchill* (e). Again *Smith*, to whom the security was given, was ignorant that *Garnham* was a trader. [*Parke* B. If the transaction is itself an act of bankruptcy, it is not protected, though there is no notice of the act of bank-

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(a) 1 C. M. & R. 443, 447.

(b) 4 B. & Ad. 831.

(c) 1 M. & W. 714.

(d) 8 East, 467.

(e) 1 Mylne & K. 546.

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Byles Serjt. was desired by the Court to confine himself to the questions whether the reservation of the shares, and the existence of a substantial surplus beyond the amount secured, prevented the assignment from being an act of bankruptcy. The question is as to the construction of stat. 12 & 13 *Vict. c. 106. s. 67*. The words of the enactment do not materially differ from those of the former bankrupt Acts. And the question is, whether this deed, conveying all the trader's property except 35*L*, was not a deed necessarily defeating or delaying the creditors. If so, the trader must be taken to have intended the necessary consequence of his own act. There is nothing in the words of the Act to confine it to an intent to defeat or delay the trade creditors. In fact the bank creditors are delayed and defeated by the removal of a shareholder's general property: for they

(a) 6 *M. & G.* 895.

(b) 6 *M. & G.* 906.

(c) 7 *M. & W.* 353.

could, by a circuitous process, procure satisfaction out of that general property, after the property of the bank was exhausted. The trade in this case was, indeed, not stopped; and, if the words of the Act were "with intent to stop his trade," that would be important. But stopping trade is no act of bankruptcy; *Young v. Waud* (a). In *Baxter v. Pritchard* (b) the sale of the whole stock in trade for ready money must have stopped the trade. [Pollock C. B. A solvent trader, leaving off business, disposes of his whole stock with the express intent to stop his trade: but no one would say that was an act of bankruptcy.] The language used in the cases cited may be explained by reference to the particular facts: in all of those cases the conveyance was such that it did in fact stop the trade; and indeed it is seldom that a conveyance of nearly all a trader's property can fail to produce that effect. Then as to the effect of the resulting trust of the surplus. In many of the cases, in which a conveyance has been held an act of bankruptcy, the conveyance was by way of security: and in all pledges, even if there is no express resulting trust, there is an implied one. In *Newton v. Chantler* (c) and in *Porter v. Walker* (d) there was an express trust of the surplus. [Cresswell J. But do you find any case in which there was a substantial surplus? I do not recollect any in which the effect of that has been discussed.] In *Graham v. Chapman* (e) the conveyance was of stock in trade to the value of 1200*l.* to 1,500*l.*, by way of security for 439*l.* 18*s.* [Jervis C. J. The facts seem to have raised

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(a) 8 *Exch.* 221.(b) 1 *A. & E.* 456.(c) 7 *East*, 138.(d) 1 *M. & G.* 686.(e) 21 *L. J. N. S. C. P.* 173.

1853. the point in that case; but I think the point was not argued.]

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Worlledge, in reply. In *Graham v. Chapman* (a) the point was not brought to the notice of the Court. [*Cresswell J.* I see, however, that it is noticed in the judgment; it is said that it was contended that the deed "necessarily delayed creditors, even with respect to the balance after the defendant had been paid, the trader's equitable interest not being seizable under a *fieri facias*." My brother *Byles* therefore is justified in quoting the case as an authority for his positions.]

JERVIS C. J. I am of opinion that the ruling which is stated on this bill of exceptions is correct, and consequently that the judgment should be affirmed. The points made were disposed of in the course of the argument, with the exception of two. Both those points arise on the one question, whether there was any evidence to be left to the jury that the transfer was an act of bankruptcy. For, if there was any such evidence, it must be taken that such evidence was properly left to the jury, and that they have found that this was a deed made by the trader with intent to defeat or delay his creditors. The facts are that *Garnham*, being a trader, conveyed all his property with the exception of two shares of little value. Had the case stopped there, that would clearly have been evidence on which the jury might find that he intended to delay his creditors. Indeed I am inclined to think that, as the delay of his

(a) 21 L. J. N. S. C. P. 173.

creditors was almost a necessary consequence of the deed, and a man must be taken to intend the necessary consequences of his acts, it was scarcely a question to be left to the jury. Then does the reservation of these shares make any difference? I think it does not. It is conceded that it makes no difference to the general creditors of *Garnham*; but it is contended, and on the facts possibly correctly, that the trade creditors of *Garnham*, being all creditors of the bank, were neither in fact delayed or defeated, nor were in any jeopardy in consequence of the transfer, which could not have the effect of stopping his trade as a banker. But we must construe the bankrupt Acts, like all others, in the ordinary sense of the words. When we find that the Legislature says a deed shall be an act of bankruptcy, if made by a trader "with intent to defeat or delay his creditors," not saying "with intent to stop his trade," or "to defeat or delay his trade creditors," we must say that, even if all the trade creditors were amply secured, so that they could not be defeated or delayed, a deed intended to defeat or delay his other creditors is within the enactment. It is very true that, if the language used in the earlier cases is taken without reference to the facts under discussion in the Court when that language was used, it would afford ground for saying that a judicial interpretation had been put upon those words confining them to deeds of which the effect was to stop the trade: but in all these cases the facts were such that the trade was stopped, and the minds of the Judges were directed to that effect only. If then we take the expressions used with reference to the facts concerning which they were used, the effect is not to controul the larger terms of the Act, which is unambiguous in itself. I therefore think that the word

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“creditors” embraces the general creditors, and that a conveyance delaying the general creditors, even though all the stock in trade is excepted, and the trade creditors are not delayed, is an act of bankruptcy.

There are in this case the additional facts, that the property is conveyed by way of security, and exceeds the value of the liabilities for which it is pledged by two thirds; and that there is an express trust of the surplus for the benefit of *Garnham*. I think these facts make no difference. The whole property is conveyed and put out of the immediate reach of the trader and of his creditors: the fact that there is a substantial surplus may prevent the deed from ultimately defeating the creditors; but it does delay them; for they are deprived of the power of taking that surplus under a *fieri facias*. In equity, it is true, the debtor's interest in the surplus may be taken; but I think the real test is, Has the trader by the deed put his property out of his controul so as to deprive himself of the present power to satisfy his creditors, as but for the deed he might do?

POLLOCK C. B. I am of the same opinion. The difficulty arises from the fact that *Garnham's* property which he held as a farmer, a character in which he was not liable to the bankrupt laws, bears so large a proportion to the shares which made him a trader. Perhaps it is hard that he should be liable to the bankrupt laws on such a trading; but there can be no distinction made between one trader and another. Now there is no doubt that, if a trader made an assignment of part of his private property, with the actual fraudulent intent to delay a particular creditor, whether that creditor was a trade creditor or not, it would be an act of bankruptcy.

All the trader's property is equally liable to be taken by the assignees. The fact therefore that this deed necessarily delayed the general creditors, was evidence to go to the jury that it was an act of bankruptcy.

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PARKE B. I am of the same opinion. The only question is, whether there can be such a complete assignment of the trader's property as necessarily to delay his creditors, when the assignment does not include his trade effects. There can be no doubt that, when the whole of the trader's property passes, that is evidence that the assignment is an act of bankruptcy. I am clearly of opinion that the exception in this case makes no difference. The supposition that it does is founded on a misapprehension of the reasons given by the Judges in the older cases, founded on expressions used by them with reference to the particular circumstances under discussion in these cases. The test is, not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader.

CRESSWELL and WILLIAMS Js., and PLATT and MARTIN Bs., concurred.

Judgment affirmed.

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Friday,
April 29th.

MANLEY *against* BOYCOT.

To an action, by the payee of a joint and several promissory note, against one of the makers, defendant pleaded that he made the note as surety for the other maker G., and that there had never been any other value or consideration for defendant's making the note; all which had always been well known to plaintiff: that, after the note was due, and before the commencement of the action, and after payment had been demanded of G., G. was indebted to plaintiff in 1100*l.*, which included the amount of the note; and plaintiff agreed with G., without defendant's leave, to give time to G. for that debt.

ACTION by plaintiff as public officer of certain persons united in copartnership under the name, &c. of *The Stourbridge and Kidderminster Banking Company*. The declaration stated that defendant and one *George Friend*, to wit on &c., "made their joint and several promissory note in writing, and delivered the same to the said copartnership, and thereby then jointly and severally promised to pay to the said copartnership, or their order, on demand, the sum of 300*l.*, for value received, with lawful interest for the same, from the day of the date of the said note; and the defendant, in consideration of the premises, then promised to pay the amount of the said note to the said copartnership according to the tenor and effect thereof; yet the defendant hath disregarded his said promise, and hath not, nor hath the said *G. F.* or any other person or persons, on their or either of their behalf, paid" &c.

Pleas (among others): 3. That the promissory note in the declaration mentioned was the joint and several note of the said *G. F.* and defendant; and that defend-

Plaintiff traversed the giving time; and the issue was found for defendant.

Held: That, in the absence of any allegation, in the plea, that plaintiff, when he took the note from defendant, agreed to receive it from defendant in the character of surety only, the plea was bad, and plaintiff was entitled to judgment non obstante veredicto. And, *per Curiam*, *quære* whether or not such an allegation would have made the plea good.

Leave to enter a suggestion, under stat. 15 & 16 *Vict. c. 76. s. 143.*, will not be granted unless the applicant shews by affidavit sufficient probable grounds for believing that the final decision on the suggestion will be in his favour.

So held, where the application was to supply the allegation as to which the Court doubted, as above.

ant "so made the said note as the surety, and at the request, and for the accommodation, of the said *G. F.*; and that there never was any other value or consideration ever existing for his, the defendant's, making or paying the said note: all which has always been well known to the said banking copartnership;" that, after the note had become due and payable, and payment thereof had been demanded of *G. F.*, and whilst the said copartnership were the holders thereof, and long before the commencement of this suit, to wit on &c., the said *G. F.* was indebted to the said copartnership in a large sum of money greater than, and including, the amount of the said promissory note, and all interest then due thereon, to wit 1100*l.*; "and thereupon it was then agreed, by and between the said *G. F.* and the said copartnership, without the consent, leave or licence of the defendant, so being such surety as aforesaid, that the said copartnership should forbear and give time to the said *G. F.* for the payment of the said debt and sum of money so including all money secured by the said promissory note as aforesaid, until certain to wit the three bills of exchange hereinafter described, and payable at the expiration of four, six and twelve months, respectively, should have become due and payable; according to the tenor and effect thereof respectively. And the defendant further saith that thereupon, and in pursuance of the said agreement, three bills of exchange for, to wit, 300*l.*, 300*l.* and 500*l.*, respectively and payable to order, four, six and twelve months, respectively, from the dates thereof, were then, to wit on the day and year last aforesaid, accepted jointly by the said *G. F.* and one *William Friend*, and then delivered to the said copartnership, and by the said copartnership then received and taken in pursuance of

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the said agreement, and for and on account of the said debt and sum of money, including the said promissory note in the declaration mentioned, so due from the said *G. F.* to the said copartnership as aforesaid; and the defendant further saith that he never in any manner assented to, or ratified, or confirmed, the said agreement." Verification.

4. A plea similar to the 3d., but stating *G. F.*'s debt to the copartnership to be 800*L.*, and the forbearance agreed upon to have been until the maturity of two bills of exchange, both dated 16th *February* 1849, for the several sums of 300*L.* and 500*L.*, payable respectively at nine and twelve months after date, drawn by *G. F.* upon and accepted by *W. F.*

5. A similar plea, but stating the debt of *G. F.* to the copartnership to be 1100*L.*, and the forbearance agreed upon to have been until the maturity of three bills of exchange, all dated 16th *February* 1849, drawn by *G. F.* upon and accepted by *W. F.*, for 300*L.*, 300*L.* and 500*L.* respectively, payable respectively six, nine and twelve months after date.

Replication to the third and fourth pleas: "That the said copartnership did not agree to give time to the said *G. F.* for the payment of the said promissory note in manner and form" &c. To the 5th plea: "That the said copartnership did not give time to the said *G. F.* for the payment of the said promissory note in manner and form" &c.

These replications concluded to the country; and issue was joined on them. The other pleas also led to issues of fact.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* sittings after last *Michaelmas* term, the jury found

for the defendant upon the issues on the third, fourth and fifth pleas, and for the plaintiff on the other issues.

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Watson, in last *Hilary* Term, obtained a rule nisi to enter judgment for the plaintiff, non obstante veredicto, on the issues found for the defendant. In this term (a),

Crowder and *Field* shewed cause. The defence set up by the 3d, 4th and 5th pleas is a valid one; the maker of a promissory note may shew that he made it as surety only, with the plaintiff's knowledge, and insist upon his rights as surety; *Hall v. Wilcox* (b). [*Wightman* J. There the plaintiff had discharged the principal. Lord *Campbell* C. J. You rely on the general rule, that the giving time to the principal discharges the surety.] Yes. *Perfect v. Musgrave* (c), referred to in a note to *Hall v. Wilcox* (b) as throwing doubt on this point, is inapplicable. There was in that case no giving time to the principal except by a composition with the principal, who had failed, and laches in not demanding payment from the defendant himself. [Lord *Campbell* C. J. Certainly the words "value received" on the face of a note do not preclude the maker from proving that it is an accommodation note.] They do not: but that will be said, on the other side, to be an exception to the general rule that the instrument only can be looked to for the relation of the parties. [Lord *Campbell* C. J. It must be shewn that the note was so made with the knowledge of the payee. That allegation is indispensable: nothing can be shewn to have

(a) April 21st. Before Lord *Campbell* C. J., *Coleridge* and *Erle* Js. *Wightman* J. left the Court during the argument.

(b) 1 *Moo. & R.* 58.

(c) 6 *Price*, 111.

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taken place which alters the terms of the contract created by the instrument itself, unless it is also shewn that it took place with the knowledge of the parties to the instrument.] In the course of the judgment in *Fentum v. Pocock* (a) it was said that even proof of knowledge would not vary the contract. But the Court there also observed that cases where there was such knowledge were very distinct from cases where there was none. There was no such knowledge in *Fentum v. Pocock* (a): the decision therefore is inapplicable here. *Price v. Edmunds* (b) and *Clarke v. Wilson* (c) will probably be relied on by the other side. But the decision in the former case proceeded on the ground that, in point of fact, no time at all had been given to the principal, although there are there extrajudicial dicta which appear favourable to the present plaintiff; and that in the latter, upon the ground that the plea did not set out any definite agreement on the part of the plaintiff to give time. In *Smith v. James* (d), recently decided in this Court, the

(a) 5 Taunt. 192.

(b) 10 B. & C. 578.

(c) 3 M. & W. 208.

(d) SMITH v. JAMES.

DECLARATION upon a promissory note, made by the defendant, for payment to the plaintiff of 30L, one month after date. Plea: That the promissory note was made by the defendant, jointly with one T. T.; that the defendant and T. T. jointly and severally promised to pay the plaintiff the amount of the said note; that the defendant never had or received any consideration for his making the said note, but that the same was made by him as surety for the said J. J.: that, after the note became due, it was agreed between the plaintiff and the said J. J., without the consent of defendant, that time should be given to the said J. J., and time was accordingly given to him, without the consent of defendant.

General demurrer. Joinder.

The demurrer was argued in Easter term (April 23), 1852, by Macnamara for the plaintiff, and H. J. Hodgson for the defendant.

The following cases were referred to: *Harrison v. Courtauld* (3 B. &

surety was held not to be discharged by time having been given to the other joint maker of the note. But in that case, which arose upon general demurrer, there was no allegation that the plaintiff, at the time of taking the note, knew that the defendant had made the note as a surety: and the same observation applies to *Harrison v. Courtauld* (a), from which *Smith v. James* (b) was held not to be distinguishable. Nothing is more common than to shew that a note or bill has been delivered under a special contract to hand over. That is very different from attempting to vary the contract expressed on the face of the instrument; which cannot be done; *Woodbridge v. Spooner* (c). [Erle J. A note cannot be conditionally drawn.] It is not contended that it can: the note here is not said to have been made upon any condition. [Erle J. Do you not contend that, though it was made payable on demand, there was really an understanding that it was not to be payable on demand? It is true that the contract created by a promissory note has two elements, one the express contract which appears upon the face of the written instrument, the other that which arises from the delivery of the instrument:

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Ad. 36), *Laston v. Peat* (2 Camp. 185), *Fentum v. Pocock* (5 Taunt. 192), *Price v. Edmunds* (10 B. & C 578), *Clarke v. Wilson* (3 M. & W. 208), *Adams v. Gregg* (2 Stark. N. P. C. 531), *Hall v. Wilcox* (1 Moo. & R. 58), *Foster v. Jolly* (1 C. M. & R. 703), *Abbott v. Hendricks* (1 M. & G. 791), *Nicholls v. Norris* (3 B. & Ad. 41. n.), *Thompson v. Clabley* (1 M. & W. 212).

*

Per Curiam (Lord CAMPBELL C. J., ERLE and CROMPTON Js.) This case cannot be distinguished from *Harrison v. Courtauld* (3 B. & Ad. 36).

Judgment for plaintiff.

E relatione H. J. Hodgson.

(a) 3 B. & Ad. 36.

(b) Ante, p. 50, note (d).

(c) 3 B. & Ald. 233.

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the delivery may be qualified.] Even the effect of the note may be qualified by external circumstances; as by shewing that value was not received, though the note states that it was. [*Coleridge J.* On the face of a bill of exchange, there is nothing said with respect to notice of dishonour.] That is so: yet the drawer's liability arises only upon such notice. So the bill says nothing of presentment in due time: yet such presentment is necessary to make the drawer liable. These qualifications are the legal incidents of a note or bill. In *Byles on Bills* (a) the admissibility of evidence at law to prove this relation of the parties is denied; but it is said that such a defence is good in equity. No doubt, parol evidence is not admissible to controul the effect of a written agreement; but a contemporaneous writing or indorsement is admissible for that purpose; *Leeds v. Lancashire* (b), *Bowerbank v. Monteiro* (c); and, on motion for judgment non obstante veredicto, it must be assumed that the allegations have been proved in the sense necessary to support the plea. If necessary, the plea may be considered as an argumentative plea of Non fecit, a circuitous denial that the defendant made a note having the legal effect which the declaration insists upon. The circumstances set up as a defence do not constitute a variance; they introduce a new term into the contract, a condition qualifying the delivery. *Gillett v. Whitmarsh* (d) was an instance of such a qualification. [*Erle J.* You may transfer either an absolute or a qualified title.] Here it is a qualified title which is transferred, a title to deal with the principal, but only

(a) Page 194. note (r) (ed. 6th.), citing *Rees v. Berrington*, 2 Ves. Jun. 540.

(b) 2 Campb. 205.

(c) 4 Taunt. 844.

(d) 8 Q. B. 966.

with the consent of the surety. [*Erle J.* The contemporaneous agreement which qualifies the contract must be between the parties, and only the parties, to the contract itself; that was the ground of the decision in *Salmon v. Webb (a).*]

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Watson, Fry and Norman, contra. The attempt is to alter the terms of a written contract by external evidence. The very object of taking a note or bill is to get rid of any difficulty, which might arise from the defendant being a surety, by requiring him to put himself in the position of maker of a note, which is legally definite and well known. His liability on the note is the same as that of the other joint maker. Oral evidence is clearly not admissible to control the effect of a written instrument; it would not be admissible, in the case of a bond by joint and several obligors, to shew that one of them executed in the character of a surety; *Ashbee v. Pidduck (b)*; nor is it admissible here. It is true that there is no express agreement, on the face of a bill, discharging the drawer if the bill be not presented in time: but that is a direct legal consequence of the contract which is expressed. It is not a collateral limitation of the written contract. [*Lord Campbell C. J.* Payment by one of the joint makers of a promissory note is a release of the other; yet promissory notes do not shew, on the face of them, any agreement that that shall be the effect of such payment.]

(a) 3 *H. L. Ca.* 510. Affirming the judgment of the Exchequer Chamber in *Webb v. Salmon*, 13 *Q. B.* 894, which had reversed the judgment of the Queen's Bench, on a point not there taken. See *Webb v. Salmon*, 13 *Q. B.* 886.

(b) 1 *M. & W.* 564.

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The common law makes payment by one cocontractor a discharge of the other. [Lord Campbell C. J. The common law also makes the giving time to the principal a discharge of the surety.] In *Foster v. Jolly* (a) Parke J. says: "Every bill or note contains two things—value either express or implied, and a contract to pay at a specified time. The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time." [Lord Campbell C. J. That is, no doubt, the general rule.] The general rule applies to this case. *Price v. Edmunds* (b), which confirms *Fentum v. Pocock* (c), has latterly been always considered as laying down the right doctrine upon this point, and is cited, as such, in *Smith's Mercantile Law*, p. 257, (4th ed.). *Nichols v. Norris* (d) is to the same effect. In *Abbott v. Hendricks* (e), an action by payee against maker, the oral evidence admitted went, not to vary the terms of the contract, but to negative the fact of value having been received by the maker of the note from the payee; so that it fell within the rule of Parke B. above mentioned. Moreover, the taking a collateral security, as was here done, does not amount to giving time. *Pring v. Clarkson* (g), *Adams v. Wordley* (h) and *Brown v. Wilkinson* (i) are authorities for the plaintiff. No real distinction can be made between the present case and *Perfect v. Musgrave* (k), or *Smith v.*

(a) 1 C. M. & R. 707.

(c) 5 Taunt. 192.

(e) 1 M. & G. 791.

(h) 1 M. & W. 374.

(b) 10 B. & C. 578.

(d) 3 B. & Ad. 41, n.

(g) 1 B. & C. 14.

(i) 13 M. & W. 14.

(k) 6 Price, 111.

James (a). In *Rees v. Berrington (b)* (commented on in *Tudor's Leading Cases in Equity*, vol. 2, p. 712) Lord *Loughborough* expressly says that, where two "are bound jointly and severally, the surety cannot aver by pleading, that he is bound as surety." In fact, there would be no necessity for relief by equity if a defence founded on that circumstance could be available at common law. In *Hollier v. Eyre (c)* it was distinctly laid down by Lord *Cottenham C.* that the question, whether a party to an instrument is so in the character of a principal or a surety, must be ascertained only by the terms of the instrument itself.

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Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that the plaintiff is entitled to judgment non obstante veredicto. The pleas on which the defendant has obtained a verdict, after stating that he was only surety for *George Friend* in becoming a party to the note, merely say: "all which has always been well known to the said banking copartnership" (who are to be considered the plaintiffs), without alleging that the note was delivered by the defendant to them as surety for *George Friend*, or that they agreed to receive it from him as such surety. Without such averment, the pleas are clearly bad. Consistently with anything they allege, there may have been an express declaration, when the note was given, that the defendant, although a surety, was to be considered in all respects liable as a principal. This probably often happens,

(a) Ante, p. 50, n. (d).

(b) 2 Ves. Jun. 540, 542.

(c) 9 Cl. & Fin. 1. 45.

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when a joint and several promissory note is given to bankers by two, one of them being their customer and debtor, the other only his surety. The bonâ fide holder of a bill or note cannot be prejudiced in the rights which he primâ facie has, according to the terms of the instrument, by knowledge subsequently communicated to him after he has become the holder of it, or even by knowledge which he has at the time when he takes it, if there is no evidence of a special agreement, at the time when he takes it, to affect the rights and liabilities of the parties. No parol evidence can be received of any agreement inconsistent with what appears on the face of the instrument, as that a bill drawn payable at three months shall not be payable till the expiration of four months: but evidence may be given by parol of an agreement, at the time a bill is drawn and indorsed, which is consistent with the written instrument; as, for example, that a bill is indorsed and handed over for a particular purpose, without giving the bailee the usual rights of indorsee of the bill. But, if the payee of a joint and several promissory note, made in the common form by two, may be placed in the situation of treating the one as surety for the other, this can only be by his express assent to do so when the note was delivered to him.

We, therefore, entirely approve of the decision of *Fentum v. Pocock* (a), overruling *Laxton v. Peat* (b), and of the subsequent decisions of the same class, which impeach the validity of the pleas in question. But cases in which it can be proved that, at the time when a note was made or a bill was accepted and handed over to the

(a) 5 Taunt. 192.

(b) 2 Campb. 185.

payee, the maker or acceptor being only a surety, the payee, knowing this fact, agreed to receive it from the maker or acceptor as surety only, may admit of a different consideration: and, consistently with our judgment, it may be held in such cases that the maker or acceptor is discharged by time being given to the principal debtor.

Rule absolute.

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Field, on a subsequent day in this term (*May 7*), obtained a rule calling on the plaintiff to shew cause "why a suggestion should not be entered herein, to the effect that the promissory note, in the declaration and the third, fourth and fifth pleas herein mentioned, was agreed by *The Stourbridge & Kidderminster Banking Company*, the defendant and *George Friend*, in the affidavit of the defendant named, should be made by the defendant as surety for *George Friend*, and was delivered to, and taken and held by, the said Company on those terms; pursuant to the 143d section of the Common Law Procedure Act."

The rule was obtained on affidavits by the defendant's agent and his clerk, which went only to shew that judgment had not yet been signed, and that there had been no delay in making the application; and on the following affidavit of the defendant: "That this action is brought to recover the sum of 300*l.* and interest, upon the joint and several promissory note of this deponent and one *George Friend* to *The Stourbridge & Kidderminster Banking Company*. And this deponent further saith that the action is brought by the said plaintiff for and on behalf of the said Banking Company, of which he is the registered public officer. And this deponent further saith that, the said *George Friend* requiring

1853. advances by the said Banking Company, the said Banking Company consented and agreed to make the advances required by the said *George Friend*, upon this deponent becoming surety for the said *George Friend* to the said Banking Company, to the extent of the sum of 300*l.*: and it was agreed that this deponent should become such surety for the said *George Friend*: and this promissory note was given for the said sum of 300*l.*, this deponent joining therein as, and being expressly understood as, surety for the said *George Friend* only. And the said promissory note was accordingly delivered over, and has been held by the said Banking Company, upon the terms upon which it was given, and upon no other terms whatever." In the following *Trinity* term (a),

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Watson, Fry and *Norman* shewed cause. The rule is moved for under stat. 15 & 16 *Vict. c. 76. s. 143.*, which enacts that, on any motion made in arrest of judgment, or for judgment non obstante veredicto, "by reason of the non-averment of some alleged material fact or facts or material allegation, or other cause, the party, whose pleading is alleged or adjudged to be therein defective, may, by leave of the Court, suggest the existence of the omitted fact or facts or other matter, which, if true, would remedy the alleged defect." This is the first time that this section has been discussed. As the suggestion is not to be entered, except by leave of the Court, the applicant must make a *prima facie* case. [*Crompton J.* The applicant must bring before the Court probable grounds for the suggestion, both in fact and in law; or the Court does not interfere.] In the present case the

(a) *June 13th, 1853.*

affidavit affords no ground for the suggestion: the defendant does not venture to pledge his oath to the fact of there having been any agreement between him and the Company, which is the essence of the suggestion.

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Crowder, contra. The Court will not scan the affidavit, as it were, on special demurrer: and, taking it fairly, the truth of the suggestion is sworn to.

LORD CAMPBELL C. J. I am of opinion that this rule must be discharged. The enactment is a most useful one, and will enable us to dispose of causes finally upon the merits. By it, if a judgment is arrested, or if it is given in favour of the plaintiff non obstante veredicto, by reason of the non-averment of a material fact, an opportunity is given to the defeated party to suggest the existence of that material fact, "by leave of the Court." Now I think the Court must anxiously watch cases of this sort, and, before giving leave for a suggestion, see that it is made on sufficient grounds. It is not enough that we are satisfied that the application is not made for delay; we must see sufficient probable grounds for allowing the suggestion. In the present case, had it been clearly made out on the affidavits that the suggestion was founded on fact, I should, without giving any final opinion, have thought it fit to permit the defendant to raise the question. No doubt, if the plea, as proposed to be amended, were true, a Court of equity would have relieved the defendant, even had the security been under seal; and, this being a security not under seal, it might be a point worth discussion whether it was necessary to go to equity for such relief. But the defendant has failed to shew that there are grounds in fact for the suggestion.

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COLERIDGE J. I think that the only way of securing that suggestions should cause cases to be decided on their merits is to require affidavits shewing, in clear and unambiguous terms, that the fact, the non-averment of which is to be supplied by the suggestion, exists. In the present case the affidavit, at the utmost, suggests evidence from which that fact may be inferred; and I think that not enough.

ERLE J. I am of the same opinion. The suggestion is not made out in fact.

CROMPTON J. Wherever a thing is to be done by the leave of the Court, the usual and the wise course has been to require proof by affidavit that there is a fit case for the interference of the Court. I think that the party asking for leave to enter a suggestion, under this section, must go farther than merely raise a doubt. I think he does not make out a fit case for our interference, unless he goes so far as to produce an impression on the mind of the Court, that the final decision may probably be in his favour, and this both on the fact and the law. My impression at present is that the suggestion, even if proved, would not make the plea good; and on that ground also I should not have thought the case for a suggestion made out.

Rule discharged (a).

(a) See *Fisher v. Bridges*, post, p. 128, note (a).

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MARY ANN HARMAN *against* EDWARD DAVEY *Friday,*
JOHNSON. *April 29th.*

THE first count of the declaration stated that defendant, on &c., by his promissory note now overdue, promised to pay to plaintiff 1670*l.*, and interest, at 5 per cent. per annum, two years after date; but did not pay the same.

The second count stated that "plaintiff retained and employed defendant, and his partner *William Henry Smith*, then carrying on their business of attorneys and solicitors in copartnership, to invest certain money on mortgage in a proper manner; and they accepted such retainer and employment, and accordingly took that money from the plaintiff to invest a mortgage in a proper manner; but, though a reasonable time for so investing it had elapsed before this suit, it has never been invested: whereby the plaintiff has lost the whole of it."

There were also counts for money lent, money received, and on an account stated.

Pleas: 1. To the 1st count: That defendant did not make the said note, &c. Issue thereon.

2. To the 2d count: "That the plaintiff did not retain or employ the defendant and the said *W. H. Smith*, nor did the defendant and the said *W. H. Smith* accept such retainer or employment, in manner" &c. Issue thereon.

The receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it, as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners. But, if money be so deposited with one partner for the purpose of its being invested

on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney.

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3. To the 2d count: "That the defendant and the said *W. H. Smith* did not take the said money, in the said 2d count mentioned, from the plaintiff as in that count alleged." Issue thereon.

4. To the residue of the declaration: *Nunquam indubitatus*. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* Sittings after last *Hilary* Term, it appeared that defendant and *William Henry Smith*, by indenture, dated 29th *November*, 1849, agreed that they would "become, continue, and be copartners in the" "profession of an attorney and solicitor, and all matters and things usually connected with, or forming part of, the carrying on of the same, or in any way or manner incidental thereto," for twelve years. It was also agreed, by the same indenture, that all cheques should be drawn in the name of the partnership firm; but all bills of exchange and promissory notes made, drawn, endorsed or accepted on the joint account of the said copartnership should be respectively made, drawn, endorsed and accepted by each of the said copartners.

Subsequently to the execution of this agreement *Smith* had, without the knowledge of defendant, received from plaintiff, professedly on behalf of the firm, a sum of 1670*L*. According to some of the evidence, plaintiff had given a general direction that this sum should be invested by the firm for her, by way of mortgage. But, according to other evidence, she had deposited it in order that it should be advanced on a particular mortgage, if that security turned out to be good. *Smith*, however, retained the money so deposited for his own private purposes, and prevailed on plaintiff to take, as security for it, the promissory note mentioned in the

declaration, which, without the knowledge of defendant, he signed in the name of the firm, "*Smith & Johnson*." *Smith* afterwards absconded; and plaintiff brought the present action against defendant alone.

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The Lord Chief Justice, after intimating his opinion that there was not evidence to fix the defendant with any liability on the promissory note, told the jury, with respect to the rest of the declaration, that, if the plaintiff employed *Smith* as the partner of *Johnson*, meaning to employ the firm of *Smith & Johnson* to invest the money for her on mortgage, or gave *Smith* the money for that purpose, and *Smith* represented to her that the firm of *Smith & Johnson* could invest the money for her on mortgage, the defendant was liable; inasmuch as the receipt of the money by *Smith* for the purpose of its being laid out on mortgage would be an act within the scope of the authority which *Smith* had as partner with defendant: for that attorneys now, as part of their business, acted as scriveners, that is, in laying out money on security; the separate profession of scrivener having fallen into disuse. Verdict for plaintiff, for 1670*l*.

Macaulay, in last *Easter* Term, obtained a rule *Nisi* for a new trial on the ground of misdirection.

Hugh Hill and *Bovill* now shewed cause. The investment in question was clearly within the scope of the ordinary business of an attorney; and the defendant is therefore liable in respect of any such transaction carried on by his partner in the name of the firm. In *Willet v. Chambers* (a) it was held that, where two persons were

(a) 2 *Comp.* 814.

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partners as attorneys and conveyancers, and one of them received money from a third party, to be invested on real security, the other partner was liable for the amount, although his partner had given a separate receipt for it. Lord *Mansfield* there says: "the business of conveyancing, in the very nature of it, as carried on in the country, is this: Where there is an attorney or counsel of credit, they receive money to place out upon securities; and persons who want to borrow, as well as those who want to lend, apply to them for that purpose." That case is in many respects similar to the present. On the motion for the rule, reliance was placed on the judgment of *Gibbs* C. J. in *Adams v. Malkin* (a), cited in *Ex parte Dufaur* (b). There it was said that the occasional deposit of moneys with an attorney for the purpose of his investing them would not constitute him a money scrivener, but that he must be carrying on generally the business of a money scrivener. It is not contended here that the defendant was a money scrivener by profession; but it is clear, even upon the cases cited on the other side, that transactions of the same nature as those formerly carried on by money scriveners form part of the ordinary business of attorneys in the present day. Besides, the jury may have found their verdict upon their belief that the money was deposited with the view to the particular security, and that *Smith*, as attorney, was to examine the security and conduct the transaction. The language of the Lord Chief Justice must have been understood by them according to the facts proved.

(a) 3 *Campb.* 534. See *Ex parte Malkin*, 2 *Rose*, 27; *S. C.* 2 *V. & B.* 31, 175.

(b) 2 *De G. & Macn.* 246.

Macaulay and *Phipson*, *contra*. It is not denied that attorneys do, in the course of their ordinary business, receive money for the purpose of laying it out upon security; but, to bring such a transaction within the scope of the ordinary business of an attorney, he must receive the money with specific instructions to invest it in a specified security: if he receives it generally, and with no instructions from the party depositing it with him beyond a general authority to invest, he acts as a money scrivener, not as an attorney; and his act will not bind the firm of attorneys as such. It may be that in some cases attorneys, as partners, do act as money scriveners also: but that is a matter of evidence; and no such question was put to the jury in this case. The misdirection was in telling the jury that the defendant would be liable if the money had been given to, and received by, *Smith*, in the name of the firm, for the purpose of investing on mortgage generally: so that the jury would be led to assume that the mere fact of partnership as attorneys constituted a partnership as money scriveners. *Willet v. Chambers* (a) is not in point. There the business of money scriveners was shewn, at the trial, to have been actually and professedly carried on by the firm. [Lord *Campbell* C. J. It certainly was my impression that all respectable attorneys were in the habit of receiving money to lay out on mortgage]. The definition of a money scrivener's business is given, and the distinction relied upon is pointed out, by *Parke* B., in *Wilkinson v. Candlish* (b).

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Lord CAMPBELL C. J. I think there should be a new

(a) 2 *Cowp.* 814.(b) 5 *Exch.* 91. 97.

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trial. The action is against *Johanson*, who is charged in the character of a partner with *Smith* in the calling of an attorney. There is no evidence going beyond the bare fact of their having jointly carried on the business of attorneys. I think that an attorney, quà attorney, is not a scrivener; that his business is to act in a Court of law, to prepare conveyances, to examine titles, and so on; but not to act as a scrivener. A scrivener has to hold the money put into his hands until he has an opportunity of laying it out; but this employment of scrivener is not a consequence of his character of attorney. The question, then, here is, whether *Smith* was acting within the scope of his partnership authority. If he received the money generally for the purpose of laying it out, he was not acting within his calling of attorney. Attorneys frequently do act as scriveners, in the full sense of the term; but there is no evidence that *Smith* and *Johanson* did so, or that the money received was received for purposes within the object of the partnership. There was strong evidence that *Smith* received the money to be laid out upon mortgage, and that he induced Mrs. *Harman* to entrust him with the money by representing that he had a security ready; but I cannot say that this was conclusive. And, when I advert to the terms in which I directed the jury, I think that they were too general. For, if the meaning of Mrs. *Harman* was, that a security should be found, and that the money should be left in order to be invested in some mortgage that might be found to be an eligible security, then the business was not to be performed in the character of an attorney. I think, therefore, that the question was left too widely to the jury: it should have been left more pointedly to them, whether the

money was placed in *Smith's* hands for the purpose of being advanced on a particular mortgage, or whether it was deposited with him until he could find a proper mortgage. Had it been so left, the jury should have been told to find for the plaintiff on the first supposition, and for the defendant on the second.

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WIGHTMAN J. As my Lord thinks that he left the question too generally to the jury, and that they may have found their verdict upon too general a view of the regular business of an attorney, I am not called upon to add many observations: but it does seem to me that, in the absence of evidence that *Smith* and *Johnson* acted generally as scriveners, the mere effect of their being attorneys would not make one partner liable for the act of another, unless upon evidence that the money was deposited in order to be invested in the particular mortgage. There was evidence from which the jury might have found this; but that does not warrant so general a direction.

CROMPTON J. (a). I am of the same opinion. Attorneys may often become liable for similar acts of their partners, where the partnership is in the habit of carrying on business by what you may call a general commission; but they do not necessarily act under such a general commission. It is conceded that they may, as incidental to their business as attorneys, receive money for the purpose of laying it out upon a particular mortgage, so that they might be liable upon this transaction; though,

(a) *Erle J.* was absent.

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on the other hand, if the money were received indefinitely, to lay out when a proper security could be found, there would be no such liability. Now the jury, on hearing the words of the charge without qualification, might infer that every receipt of money for either of these purposes by one partner would make the other liable; although, if the words had been used merely with reference to money deposited with a view to a particular investment, they would have been quite right.

Rule absolute.

Friday,
April 29th.

THE YORK and NORTH MIDLAND RAILWAY COMPANY *against* THE QUEEN, on the Prosecution of BURTON and LEAING.

(In the Exchequer Chamber.)

This case is reported in 1 *E. & B.* 858.

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SMITH *against* The LONDON and NORTH
WESTERN Railway Company.

Saturday,
April 30th.

DECLARATION, upon a writ issued 29th May, 1852: For that one *John Day* was the inventor of a new manufacture within this realm, to wit an invention of *An improved wheel for carriages of different descriptions*, which invention others, at the time of the sealing of the letters patent after mentioned, did not use; and that King *William* the 4th, by letters patent of 14th August 1836, granted to him, his executors, administrators and assigns, license &c., that he and they might have and enjoy the whole profit &c. coming &c. by reason of the invention, for fourteen years, requiring all other persons &c., during the continuance of the term, not to use &c. the invention: with proviso, avoiding the letters patent if *Day* should not describe the nature of the invention, by instrument under his hand and seal, and enrol it in the Court of Chancery within six months. That a specification, describing &c., was enrolled within six months. That, to wit August 1845, *Day*, by indenture, assigned the invention and letters patent to plaintiff and one *Thomas Willey*, since deceased, as tenants in common and not joint tenants. Breaches: 1. That defendants, after the assignment and in the life of *Willey*,

The specification of a patent for improvements in wheels described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron, by means of welding pieces of wrought iron together so as to form the rim, spoke and nave into one compact mass.

Defendants used a wheel made by welding pieces of wrought iron together so as to form a single compact piece of wrought iron: the mode of forming the nave was the same as that in the specification; the mode of forming the rim was different.

Held that, it

appearing that the mode of forming the nave was a material, new and useful part of the invention, the use of it by defendants was an infringement of the patent, although, in the specification, after describing the whole structure, the invention was stated to consist in the circumstance of the centre, boss or nave, arms and rim, of the wheel being wholly composed of wrought iron welded into one solid mass "in manner hereinbefore described."

Where *A.* and *B.* are tenants in common of a patent assigned to them, if *B.* dies, actions for infringements committed in *B.*'s lifetime survive to *A.*, who is entitled at law to recover the whole damages.

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and during the term of fourteen years, without the licence and against the will of plaintiff and *Willey*, used, exercised and vended the invention. 2. That defendants, after &c., and in the life of *Willey*, and during the term &c., without the licence &c., put in practice the invention. There were also breaches for putting in practice a part of the invention, for counterfeiting the invention, and also that defendants did "make and cause to be made divers additions to the said invention, and subtractions from the same, whereby to pretend themselves the inventors or devisors of such invention," with allegations similar to those in the first breach.

Pleas (among others): 2. Not guilty; 4. That the supposed invention was not an invention of any manner of new manufactures or new manufacture, in manner &c.; 5. That the alleged invention was not; at the time of making the letters patent, new as to the public knowledge, use and exercise thereof in this realm; by reason whereof the letters patent were void: verification.

The plaintiff joined issue on the 2nd and 4th pleas; and, to the 5th, replied that the invention was new &c. Issue thereon.

Other issues in fact were joined.

On the trial, before *Martin B.*, at the last *Liverpool* Assizes, the grant of the letters patent, the assignment and the enrolment of the specification were proved. The specification, so far as is material to the decision in the case, described the invention to be of an improved wheel manufactured wholly of bar iron (*a*). Each spoke was formed by welding together two pieces of rolled iron bars, which, so welded, formed the main spoke. But, at

(*a*) For the language of the commencement of the specification, see the judgment, post, pp. 74, 75.

the extremity towards the nave, the ends of the two bars were deflected one from another, and moulded so as to meet again, thus leaving between them a vacancy which was filled up with a piece of wrought iron. The mass, thus constructed at the nave end, was so shaped as to form a segment of the intended nave, and, with the corresponding parts of the other spokes, make a circular nave, having the spokes radiating from it in the usual way. When the segments were heated and put together, a circular plate was welded upon each side of the nave, so that the plates and segments might all be welded together in such a manner as to form a solid wrought iron nave. At the end of each spoke towards the rim of the wheel, the ends of each pair of bars were deflected from each other, so as to form parts of a circle, which was completed by the insertion of other pieces of wrought iron welded to them. Around this a series of pieces of iron were welded of a proper shape and strength to form the tire of the wheel. By means of this contrivance, all parts of the wheel were welded together so as to form a compact piece of wrought iron. The details were very fully described in the specification, with the aid of drawings: and the specification concluded as follows. "Having now described my said improved wheel for carriages of different descriptions, I, the said *John Day*, do hereby declare that the new invention, whereof the exclusive use is granted to me by the said letters patent, consists in the circumstance of the centre boss or nave, arms and rim of the said wheel being wholly composed of wrought or malleable iron, welded into one solid mass, in manner hereinbefore described: but I make no claim to any wheel with wrought iron arms united by cast iron for a central boss or nave, although such wheel may have

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a wrought iron rim; nor do I make any claim to any particular mode of fastening my improved wheel upon the axis, or of fixing a box with such wheel. In witness" &c.

Evidence was given to shew that the defendants, during the fourteen years, and after the assignment, and in *Willey's* lifetime, had made and used wheels the parts of which had been welded together so as to form one compact piece of wrought iron; and that, with some unimportant variations, the mode of constructing and welding together the pieces forming the nave was the same with that described in the specification: but it appeared that the wheels were in other respects, especially as to the rims, constructed in a mode materially different from the invention, and which was known before the date of the patent. The counsel for the defendants contended that, if the claim in the specification was to be construed as extending to the mode of constructing a wheel as an entire thing, the plaintiffs must fail on the 2d issue, for the defendants had not infringed; and that, if the claim extended to all the parts described, some of them were not new, and that the defendants were therefore entitled to verdicts on the issues upon the 4th and 5th pleas. The learned Baron told the jury that, though any one was entitled to use an old contrivance, the patent protected the patentee against the use by others of any new and material part of the invention described, whether or not used in combination with what was old; and he desired them to find for the plaintiff on these issues if they were of opinion that there had been an imitation of an important and new part of the invention described.

It appeared that *Willey* had died subsequently to the infringements complained of. The counsel for the

defendants contended that the plaintiff was not entitled to recover more than half of the damages sustained by the infringement: but the learned Baron directed the jury to find for the whole damages, if the issues were found for the plaintiff.

Verdict for the plaintiff on all the issues; damages 1250*l*. Leave was then given to move to enter a verdict for the defendants on the issues upon the 2d, 4th and 5th pleas, or to reduce the damages by one half. In this term (a),

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Atherton moved accordingly, and also for a new trial on the ground that the damages were excessive. As to the first point, the patentee, by the terms of his claim, insists upon the monopoly of a wheel composed of wrought iron "welded into one solid mass, in manner hereinbefore described." He thus makes a claim for the whole inseparably, not for distinct parts, except as combining to make such a whole as he describes. Now the proof of the infringement shewed an imitation only by adapting the imitated parts to a different whole. In *Barber v. Grace* (b) it was held that, where a specification limited the claim to the particular machine therein described, no infringement was committed by applying the principle of the invention to a machine substantially different. There the claim was, for "the submitting hosiery and similar goods, made of elastic stocking fabric, to the pressure of hot boxes or surfaces heated by steam, water, or other fluid, as above described." The description was of a machine consisting of boxes; the alleged

(a) April 20th. Before Lord Campbell C. J., Wightman, Erle and Crompton Jts.

(b) 1 *Exch.* 339.

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infringement was by means of heated rollers; but in each case the goods were submitted to the pressure of surfaces heated by steam. [*Crompton J.* referred to *Newton v. Grand Junction Railway Company (a).*]

Secondly, it is true that tenants in common of land may maintain a joint action for an injury done to the land, and that such action survives (*b*): but the question here is, whether an action in respect of such right as is given by the assignment of a patent falls under the same rule. The loss to one tenant in common here was not the loss to the other.

Thirdly, supposing the plaintiff entitled to the whole damages, they have been estimated too highly.

Lord CAMPBELL C. J. We are all of opinion that the action survives. On the other points, we will confer with my brother *Martin*.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

This was an action for the infringement of a patent. Mr. *Atherton* moved for a rule for a new trial: First, on the ground that there was no evidence of infringement, and that the Judge was wrong in ruling that there was evidence of the infringement to go to the jury; and, Secondly, on the ground of excessive damages.

The patent was for an improved wheel for carriages of different descriptions: and the patentee stated, in his specification, that the "said improved wheel is manufactured wholly of bar iron, by welding wrought iron bars

(a) 5 *Exch.* 331. See *Sellers v. Dickinson*, 5 *Exch.* 312.

(b) *Co. Litt.* 198. a.

together into the form of a wheel, whereof the nave, spokes and rim, when finished, will consist of one solid piece of malleable iron. And the mode whereby the said bars of malleable iron are fashioned and united into the shape of a wheel is as follows." The specification then shewed, by the aid of drawings, how the main spoke and rim were formed, and afterwards welded, so as to make a wheel of one piece of malleable iron. In the claim, the patentee stated that the new invention consisted in the circumstance of the centre boss or nave, arms and rim of the said wheel being wholly composed of wrought or malleable iron, "welded into one solid mass, *in manner hereinbefore described.*"

The evidence shewed a clear imitation and infringement of the manner of forming the boss or nave into one piece of malleable iron with the rest of the wheel: but it was stated that the mode which the defendants had used of forming and welding the spokes and rim did not amount to any infringement. Mr. *Atherton* contended that the words of the claim restricted the patent to the invention of a wheel made in every respect "in manner hereinbefore described;" and that, as the defendants had not used the same mode with regard to the spokes and rim as the patentee had specified, there could be no infringement of the patent. My brother *Martin*, who tried the cause, intimated his opinion that the claim was for the invention of a wheel as described in the claim: but that, if the defendant had imitated or pirated the mode of welding the nave, and that were a material part of the invention, there was an infringement of part of the patent, for which the action was maintainable.

We are of opinion that this ruling was quite correct, and that there was ample evidence to support the action.

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Where a patent is for a combination of two, three or more old inventions, a user of any of them would not be an infringement of the patent; but, where there is an invention consisting of several parts, the imitation or pirating of any part of the invention is an infringement of the patent. Suppose that a man invents a machine consisting of three parts, of which one is a very useful invention and the two others are found to be of less practical use, surely it could not be said that it was free to any person to use the useful part, so long as he took care to substitute some other mode of carrying out *the less useful parts* of the invention.

We should be sorry to throw any doubt upon the question of an infringement of a material part of such an invention being an infringement upon which an action is maintainable, by granting a rule to shew cause upon such a point.

Upon the question of excessive damages, it was suggested that the jury had proceeded, only, upon the evidence, of a party interested in the patent, that a large percentage of 15 per cent. on the value of the machines made by the defendant ought to be paid to the patentee. On consulting my brother *Martin*, however, we find that in his opinion the jury did not proceed on the above ground, and that there was evidence to support the verdict in the correspondence between the parties, from which it appeared that the patentees had applied to the defendants for a sum of money for their use of the patent for a particular period, which was proportionate to the sum which the jury gave for the period during which the defendants appeared at the trial to have used the patent; and that the defendants did not, in answer,

object that the amount of claim was unreasonable. The learned Judge adds that the damages, though large, were not in his opinion at all excessive.

There will therefore be no rule.

Rule refused.

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The GREAT WESTERN RAILWAY COMPANY *against* Saturday,
The QUEEN. April 30th.

(In the Exchequer Chamber).

This case is reported in 1 *E. & B.* 874.

The QUEEN *against* TYRWHITT and others. Monday,
May 2d.

PASHLEY, in last *Michaelmas* Term, obtained a rule calling on *Robert Philip Tyrwhitt, Esq.*, one of the magistrates of the Police Courts of the Metropolis sitting &c. within the Metropolitan Police Dis-

By a local and personal Act (6 G. 4. c. clxxv.) provision was made for electing governors and directors

for the relief of the poor and for the watching and lighting of a district, consisting of one parish and part of another; and the governors and directors were empowered to elect auditors for the purpose of auditing the accounts of the district. The governors and directors were empowered to make rules for the application of moneys to be raised under the Act; to bring or defend actions affecting the property vested in them under the Act, or relating to the due execution of the Act; and to meet and ascertain the amount necessary to be assessed for the purposes of the Act, which amount the inhabitants were to raise by rate. The governors and directors were also empowered to appoint a clerk, and to make such allowance to him and their other officers as they should think proper. Auditors were also to be elected by the inhabitants, who were to meet half yearly, at least, and were empowered to appeal against any part of the accounts of which they should disapprove. After the passing of this Act, the Poor Law Commissioners included the district within one of several unions comprised in the *N.W.M.* District, for which last district they appointed an auditor under stat. 7 & 8 Vict. c. 101. s. 32. The last mentioned auditor disallowed part of a bill of costs, paid by the governors and directors to their clerk, and surcharged three of the governors and directors with the amount disallowed.

Held, that he had power so to disallow and surcharge, notwithstanding the provisions of the local Act.

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trict, *William Law, Thomas Southgate* and *Edward Tyrrel Smith* to shew cause why a distress warrant should not be issued under the hand and seal of the said *R. P. T.*, to levy the sum of 63*l.* 16*s.* 1*d.*, by an order under the hand and seal of the said *R. P. T.* ordered to be paid by the said *W. Law, T. Southgate* and *T. Smith*, on the goods and chattels of the said *W. Law, T. Southgate* and *T. Smith*.

The affidavits in support of the rule set forth Mr. *Tyrwhitt's* order to pay. The order was dated 30th January 1851. It recited a complaint made to Mr. *Tyrwhitt*, on 10th October 1850, by *James Hales Mit-chiner*. The substantial facts of the complaint, as set out in the order, appeared to be that, on 7th July 1836, the part of the parish of *St. Andrew Holborn* which lies above the Bars, and the parish of *St. George the Martyr*, in *Middlesex*, were united for the administration of the poor-laws, and were parts of and included within the *Holborn Union*: and afterwards, by order of that date, the Poor Law Commissioners ordered that that Union and several others, and also certain single parishes, "should be united, and thenceforth be and be deemed, a Union for the purpose of appointing an auditor in the manner thereafter provided:" and "that the guardians of such parishes and Unions should, at the time and in the manner therein mentioned, appoint an auditor for the examining and auditing, allowing or disallowing, of accounts in the said respective parishes and unions, and in each of the said respective parishes comprised in such unions, respectively, and to perform such other duties of an auditor at such places, within such limits, for such period, and at such salary, to be paid at such time, and in such modes and proportion, as the said

Commissioners should in and by the said order, or by any order to be thereafter made touching such office of auditor, direct or determine." That, on 28th July 1836, *Mitchiner* was appointed auditor. Other orders of the Commissioners were then set out, the effect of which was that certain additions to and subtractions from the Union were made, and that finally there was constituted a district, called *The North West Metropolitan Audit District*, of which *Mitchiner* was appointed, and still continued, auditor, and which included the *Holborn Union*, *St. Andrew Holborn* above Bars and *St. George the Martyr*. That, on 30th March 1849, and after the passing of stat. 6 G. 4. c. clxxv. (a), *Law*, *Southgate* and *Smith*

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(a) Local and personal, public. "For the better ascertaining, charging and collecting of the rates for the relief of the poor within that part of the parish of *Saint Andrew Holborn* which lies above the Bars in the county of *Middlesex*, and the parish of *St. George the Martyr*, in the said county; for the better maintenance, employment and regulation of the poor thereof; and for regulating the nightly watch thereof."

Sect. 5 empowers the inhabitants of the part of the parish of *St. Andrew Holborn* which lies above the Bars, and of the parish of *St. George the Martyr*, to elect annually, from among themselves, in certain proportions, fifty persons as "governors and directors of the poor" of the said part of the parish of *St. Andrew Holborn* and the parish of *St. George the Martyr*, in conjunction with the rectors, churchwardens and overseers of the two parishes, and the justices of the peace for the county residing within them; "and such governors and directors shall and may from time to time make such orders, rules, and regulations for the better government, relief, maintenance, and employment of the said poor, and" (subject to certain provisions hereinafter mentioned) "for the ascertaining, charging, collecting, managing, and regulating of the poor rates for the said part" &c. "and the said parish" &c., "and for the appointment, regulation, and management of the watchmen and beadles hereinafter directed to be employed, and also for the regulation of the constables duly appointed to serve for the same, as to them shall appear necessary and expedient."

By sect. 10 the governors and directors are "empowered to bring or cause to be brought, and to defend or cause to be defended, any suit or suits, action or actions, relating to or in anywise affecting" the property

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were, according to the provisions of the Act last mentioned, appointed governors and directors of the

provided for the purposes of the Act, "or otherwise relating to the due execution of this Act."

Sect. 12 fixes the times at which the governors and directors are to meet, "to calculate, ascertain, and settle the amount of the several sums of money which shall be considered requisite to be assessed and charged, as well for the relief, maintenance, lodging, and employment of the poor of the said part" &c. "and the said parish" &c., "and for regulating and maintaining a nightly watch and beadies within the same, as for discharging any debt" remaining unsatisfied by reason of the deficiency of any former rate.

Sect. 13 directs the inhabitants, within twenty days "after the several sums of money shall have been so ascertained as aforesaid," to meet and "make two distinct rates or assessments, to be raised by an equal pound rate," the gross amount not to exceed the gross amount of the sums so ascertained, after allowing for deficiencies in collecting; "one of such rates to be for and to be applied towards the relief, maintenance, lodging, and employment of the poor of the said part" &c. "and the said parish" &c., "and the other of such rates to be for and to be applied towards defraying the expences of the watch and beadies to be employed for and within the same."

Sect. 28 enables the governors and directors to appoint a clerk, collectors, treasurers, assistant overseers, inspectors, "together with such other officers and servants as they shall deem necessary for the due execution of this Act;" and, "out of the rates to be collected by virtue of this Act," "to pay and make such salaries, remunerations, and allowances to the clerk and other officers and servants (except the treasurer or treasurers) as they the said governors and directors shall in their discretion think proper."

By sect. 30 the inhabitants are empowered to elect, annually, "auditors of the accounts of the said governors and directors," who are to meet twice at least in each year, for the purpose of auditing the accounts: "and in case the said auditors should think there is just cause to disapprove of any part of the accounts so to be presented, it shall be lawful for the said auditors, or the major part of them, if they shall think fit, to appeal against the same," as provided in the Act.

Sect. 40 enacts "that the said governors and directors, at any of their meetings," not less than twenty being present, "may from time to time make such rules and regulations," for, among other things, "drawing the moneys from the hands of the treasurer, and for applying the moneys to arise by virtue of this Act, and for the more effectually carrying the purposes of this Act into effect, as to them shall seem expedient."

poor of the said part of *St. Andrew Holborn* and *St. George the Martyr*. That, on 1st, 5th and 18th *January*, 1850, *Mitchiner* (after certain formal steps, which were recited in the complaint) held the half yearly audit for that district, and disallowed, in the accounts of the said part of *St. Andrew Holborn* and *St. George the Martyr*, the sum of 63*l.* 16*s.* 1*d.*, forming part of a gross sum of 82*l.* 16*s.* 11*d.* which had been paid to their clerk. That *Mitchiner* surcharged *Law*, *Southgate* and *Smith* with this sum of 63*l.* 16*s.* 1*d.*, and certified accordingly, and reported the certificate to the Commissioners within less than nine calendar months before the complaint. That *Law*, *Southgate* and *Smith* had not paid the sum. Mr. *Tyrwhitt's* order then adjudged that they should pay the same to the treasurer of the guardians of the said part of *St. Andrew Holborn* and *St. George the Martyr*; and that the same if not paid should be levied by distress and sale; and, in default of distress, they should be imprisoned for a month, unless the sums and costs &c. should be sooner paid.

The affidavits in support of the rule stated that legal evidence was given before Mr. *Tyrwhitt* of all the facts mentioned in the order. That application for payment had been made to *Law*, *Southgate* and *Smith*, but they had not paid. That they had been summoned before Mr. *Tyrwhitt* to shew cause why a distress warrant should not issue: but he, on the hearing (29th *May* 1852), declined to issue the warrant.

Lush now shewed cause. The Union auditor had no power to disallow the payment in question. That payment was made under the provisions of stat. 6 *G.* 4.

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c. clxxv., which gives to the district of *St. Andrew Holborn* above Bars and *St. George the Martyr* auditors of their own, distinct from those appointed by the Poor Law Commissioners. By sect. 5 of that Act power is given to the inhabitants of the district to elect governors and directors of the poor. By sect. 10 the governors and directors are empowered to cause actions to be brought or defended. By sect. 28 the directors are empowered to appoint a clerk; and also to appoint collectors and treasurers; and, out of the rates to be collected under the Act, to "pay and make such salaries, remunerations and allowances to the clerk and other officers and servants (except the treasurer or treasurers) as they the said governors and directors shall in their discretion think proper." By sect. 30 the inhabitants are empowered to elect, annually, "auditors of the accounts of the said governors and directors," who are to meet twice at least in each year, for the purpose of auditing the accounts. It is clear, therefore, that the local Act gives the governors and directors unlimited discretion as to what allowances they make to their clerks and other officers: and the district auditor, under stat. 7 & 8 *Vict. c. 101. s. 32.*, has no power to strike out any items. It is only where no local Act exists that he has this power. Here the district has auditors of its own. Moreover, the local Act, under which the payment is made, is for other purposes besides the relief of the poor; and therefore the payment which has been disallowed does not fall within the jurisdiction of the Poor Law auditor. [Erle J. The auditor's power to disallow is given by stat. 7 & 8 *Vict. c. 101. s. 32.*; the whole question turns upon the interpretation of that section. I think the

words are verba generalissima.] Stat. 7 & 8 *Vict. c. 101. s. 32.* provides that every auditor "shall have full powers to examine, audit, allow, or disallow of accounts, and of items therein, relating to moneys assessed for and applicable to the relief of the poor of all parishes and unions within his district, and to all other money applicable to such relief." The provision for disallowing applies only where there are no auditors under a local Act. In *Regina v. Governors of St. Andrew (a)* it was held that the governors and directors of this district were bound to submit their accounts to the Union auditor, appointed under stat. 4 & 5 *W. 4. c. 76. s. 46.*, but not that the latter had authority to disallow such an item as this in the accounts. [Lord Campbell C. J. The submission of the accounts would be useless unless the Union auditor had some control over them.] No doubt, he has control over all items with respect to which the local Act does not give the governors and directors a discretionary power.

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Pashley, contra, was stopped by the Court.

LORD CAMPBELL C. J. It seems quite clear that the Union auditor had power to disallow this payment. The case mentioned is directly decisive upon the point: and, were there no precedent, I should have no hesitation in coming to the same conclusion.

WIGHTMAN J. concurred.

ERLE J. *Regina v. Governors of St. Andrew (a)* .

(a) 6 Q. B. 78.

1853. shews that the auditors appointed under stat. 4 & 5 *W.* 4. c. 76. s. 46. had power to enquire into the expenditure of all the money raised under a poor rate, though some of it might be applicable to purposes other than the relief of the poor.

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CROMPTON J. concurred..

Rule absolute (a).

(a) See *Regina v. Governor &c. of Poor of Bristol*, 13 Q. B. 405.

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In the Matter of WILLIAMS.

An order of removal was suspended; but afterwards, the pauper having died, the suspension was taken off, and an order was made for costs, under stat. 35 G. 3. c. 101. s. 2., upon the parish to which the removal had been made. Neither order was appealed against. After the time for appeal had

expired, application was made to a magistrate for a distress warrant, the costs having been demanded and not paid. On the hearing, it was objected that, since the expiration of the time, the parish, to which the removal was ordered, had discovered that there had been a five years' residence in the removing parish, under stat. 9 & 10 Vict. c. 66. The magistrate, on this objection, refused the distress warrant.

Held, that he was bound to issue it, the objection, if valid, being one which could be taken only by appeal against the order for costs.

ARCHBOLD, in last *Easter* Term, had obtained a rule calling on *Charles Parkinson*, Esquire, one of the justices of the peace for *Brecknockshire*, and *Thomas Williams*, churchwarden of the parish of *Cwm-yoy*, in *Monmouthshire*, to shew cause why the said *Charles Parkinson*, as such justice, should not grant to the churchwardens and overseers of the poor of the parish of *Llanelly* in *Brecknockshire* a distress warrant against the said *Thomas Williams* to levy the sum of 108*l.* 19*s.* 3*d.*, the amount of costs incurred by the suspension of an order for the removal of *John Price* and *Jane* his wife,

paupers, from the parish of *Llanelly* to the parish of *Cwmyoy*, directed, by an order of the said justices of the peace for the said county, to be paid by the churchwardens and overseers of *Cwmyoy* to *William Williams*, for the use of the parish of *Llanelly*.

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From the affidavits upon which the rule was obtained, it appeared that on the 4th *June*, 1841, an order of removal was made by two justices of the peace for *Brecknockshire*, directing *John Price* and *Jane* his wife, paupers, to be removed from the parish of *Llanelly* in that county to the parish of *Cwmyoy*, the latter being by the order in question adjudged to be their lawful place of settlement. By indorsement of the same date, the order was suspended, on the ground of the illness of one of the paupers. On 29th *October* 1852, both the paupers being dead, a second indorsement was signed by Mr. *Parkinson* and another justice for the county, in which the deaths were stated, and it was ordered that the first order should be executed, and that the churchwardens and overseers of *Cwmyoy* should pay to *W. Williams*, for the use of *Llanelly*, the sum of 108*l.* 19*s.* 3*d.*, which the order stated to have been "incurred by the suspension" of the order of removal. The original order and indorsement, and the subsequent indorsed order of 29th *October* 1852, were duly served on the parish officers of *Cwmyoy*, and payment demanded: but no payment was made. No notice of appeal was given on the part of *Cwmyoy*. The parish officers of *Llanelly* summoned the parish officers of *Cwmyoy* before Mr. *Parkinson*, to answer to an information for such neglect of payment. On the hearing, on the 11th *February* 1853, it was objected, by the parish officers of *Llanelly*, that the paupers were irremovable from *Llanelly*, under stat.

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9 & 10 *Vict. c. 66. s. 1.*, by reason of their residence there for five years, and that therefore a portion of the costs should have been charged against the union to which *Llanelly* belonged; and that the previous costs were irrecoverable by reason of time having run against the claim of *Llanelly*. Mr. *Parkinson* thereupon refused to grant a warrant of distress. *William Williams* was assistant overseer of *Llanelly*.

In the affidavits in answer it was deposed that proof was given before Mr. *Parkinson* of the residence of *John Price* in *Llanelly* for about twelve years before he became chargeable: and it was further deposed that this had been first discovered after the time for appeal had expired.

Pashley now shewed cause. It is clear, according to the law now established (*a*), that the paupers came within the provisions of stat. 9 & 10 *Vict. c. 66. s. 1.*, although the original order of removal was made before the passing of that act. Being, therefore, rendered irremovable by its provisions, they come within the operation of stat. 11 & 12 *Vict. c. 110*. The effect of sect. 3 of that Act, which has been reenacted (*b*), is to make, after the 30th *September* 1848, all costs incurred in the relief of paupers, who, not being settled in the parish where they reside, are irremovable by the provisions of stat. 9 & 10 *Vict. c. 66. s. 1.*, chargeable upon the common fund of the Union in which such parish is comprised. [Lord *Campbell* C. J. All costs incurred since the date of the Act.] That is the effect of sect. 3.

(*a*) See *Regina v. Chedgrave*, 12 Q. B. 206.

(*b*) Stats. 12 & 13 *Vict. c. 103.*, 13 & 14 *Vict. c. 101.*, 14 & 15 *Vict. c. 105.*, 15 & 16 *Vict. c. 14*.

The Court then called upon

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Archbold, contra. The order, upon the face of it, does not shew the fact of the paupers having become irremovable by a five years' residence; the order is therefore not bad upon its face: and the objection now taken should have been brought forward upon an appeal against the order, and not as an objection to enforcing it. [*Erle J.* Is an order conclusive, merely because it has not been appealed against, when it is obtained *ex parte*?] *Churchwardens of Birmingham v. Shaw* (a) decides that it is. The justices had no notice of the five years' residence; they were, therefore, bound to make the order for all costs. Stat. 35 G. 3. c. 101. s. 2. expressly prescribes that form of proceeding in cases like the present, where the pauper dies before the execution of the order.

Pashley was then called upon again. Under stat. 11 & 12 Vict. c. 43. s. 11. the complaint before the justice ought to have been made within six calendar months of the matter of complaint arising; the word "such" in that section refers to sect. 10, from which it appears that the enactment comprehends cases where justices are called upon to make an order. Stat. 35 G. 3. c. 101. s. 2. gives appeal against the order for costs only where the question is as to quantum. [*Lord Campbell C. J.* The order upon which the parish of *Llanelly* insists is one of 29th October 1852: and the magistrate heard the case on 11th February 1852.] The costs might have been applied for long before. [*Wightman J.* Supposing they

(a) 10 Q. B. 268.

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might, was it compulsory on *Llanelly* so to apply?] The practice in this respect seems to be regulated by sect. 84 of stat. 4 & 5 W. 4. c. 76.; from whence it would appear that the time runs from the first accruing of costs after service of the notice of the suspended order, and that a summons may be immediately obtained under sect. 101. *Churchwardens of Birmingham v. Shaw* (a) was a case of poor rate: the magistrate in such a case acts only ministerially, and has no discretion where there is a refusal to pay the rate; *Shingley v. Surridge* (b). Here there is a discretion.

LORD CAMPBELL C. J. The rule must be made absolute. The Legislature has provided a tribunal where orders of this description may be examined by an appeal at the Quarter Sessions next after the making of such order. If this course had been adopted in the present case, it would have properly raised the question as to what part of the costs should be borne by the parish, and what by the common fund of the Union. There has been no appeal: and then the warrant is applied for. I think that the magistrate was bound to grant it, the opportunity of appealing against the order having been passed by.

WIGHTMAN J. concurred.

ERLE J. I am not prepared to lay it down as an universal rule that facts which are grounds of appeal against an order cannot be brought forward by way of defence when it is sought to enforce an order which has

(a) 10 Q. B. 868.

(b) 11 M. & W. 503. 514.

not been appealed against: but in this case I am of opinion that the objection could be taken only on appeal.

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CROMPTON J. concurred.

Rule absolute.

PIERRE POIRIER and FRANCES EMMANUEL POIRIER
against JAMES MORRIS, JOHN LEWIS PREVOST
and GEORGE PREVOST.

Tuesday,
May 3d.

ASSUMPSIT on a bill of exchange, dated 29th October 1847, drawn by the defendants, under their name of *Morris, Prevost & Co.*, on *Alexander Dassier* of

Assumpsit by payees of a foreign bill against drawers. Plea; that the bill was sold by

defendants to *C.* on one foreign post day, on the terms of being paid according to usage on next foreign post day; that *C.* purchased the bill as agent for *H.*, and remitted the bill to plaintiffs as such agent, and plaintiffs received it for collection for *H.*; that, before the next foreign post day, *C.* failed, and did not pay the price; that there was no value as between *C.* and *H.*, or as between *C.* and plaintiffs; and that plaintiffs were holders without value. *De injuria.*

On a case, on which the Court were to draw inferences of fact, it appeared that *C.* was a *London* merchant, and plaintiffs *Paris* merchants, both correspondents of *H.*, an *American* merchant. *H.* was indebted to both *C.* and plaintiffs. Plaintiffs wrote to *H.* for a remittance. *H.* sent to *C.* a bill on *London*, for an amount exceeding *H.*'s debt to *C.*, desiring him to realize it, pay himself his own account, and remit the balance to plaintiffs. *C.* realised the draft, credited *H.* with the proceeds, and bought of defendants, in the ordinary course in *London*, a bill, for the amount of the balance due to *H.*, which bill was to be drawn by defendants payable to plaintiffs' order, to be delivered by defendants to *C.* in *London* on one foreign post day, and paid for to them by *C.* on the next. The bill in question was drawn, and delivered to *C.*, and sent by him to plaintiffs, who, by letter to *C.*, acknowledged the receipt on account of *H.*, and stated that they would advise *H.* thereof. Before the next foreign post day, after the delivery of the bill to *C.*, *C.* failed. Defendants never received anything for their bill: they directed the drawee not to honour it; and it was dishonoured accordingly. Afterwards *H.* paid plaintiffs in full. The action was in the name of plaintiffs for *H.*'s benefit.

Held, that plaintiffs were holders for value, as they held the bill at the time of its dishonour on account of the debt from *H.* to them; and that the subsequent assignment of the equitable interest to *H.* did not affect plaintiffs' right to sue at law.

Held, also, that *H.* had given full value for the bill to *C.*: that, as between *H.* and defendants, *C.* could not be considered as agent for *H.* in buying the bill; and that the credit given by defendants for the price of the bill was given to *C.* as buyer, and not as agent for *H.*

A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit, as purchasers, for what he buys in the home market on their account.

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Pleas: 1. To 1st count: That the delivery of the bill was obtained by the fraud of one *Coates*, alleged to be agent of the plaintiffs.

2. To 1st count: That defendants made and delivered the bill to one *Coates* on the terms of being paid the price according to the usage of merchants, that is to say, on the foreign post day which would be the next after such delivery: that *Coates* purchased the bill, as agent of *Hovey, Williams & Co.*, and, before the next foreign post day, as such agent, remitted the bill to the plaintiffs, and the plaintiffs received the same, for the purpose of the amount thereof being collected and received at maturity for the account of the said *Hovey, Williams & Co.*, and to be placed to their credit in account with the plaintiffs: that, before the said bill came to maturity, the next foreign post day elapsed, and *Coates* did not pay the price, and the defendants have never had value: that, before the bill came to maturity, the plaintiffs had notice of the circumstances: that there never was value for the remittance, either as between *Coates* and *Hovey, Williams & Co.*, or as between *Coates* and the plaintiffs; and that the plaintiffs always, and at the time of the commencement of the suit, were holders without value.

Replication, to each plea respectively: *De injuriâ*. Issues thereon.

To the residue of the declaration the defendants pleaded that they did not promise. Issue thereon.

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On the trial, before Lord Campbell C. J., at the *London* sittings after *Michaelmas* Term 1852, a verdict was found for the plaintiffs, subject to the opinion of this Court on a case, the material parts of which were as follows.

The plaintiffs, in and during the year 1847, were merchants carrying on business at *Paris*, under the firm of *Poirier, Frères*. The defendants, during that time, carried on business in *London* as merchants, under the name of *Morris, Prevost & Co. Hovey, Williams & Co.* were, during the same time, a firm carrying on business as merchants at *Boston* in the United States of *America*. The plaintiffs were, during that time, correspondents of *Hovey, Williams & Co.*, and were in the habit of purchasing goods and shipping them for account of *Hovey, Williams & Co.*, and of being reimbursed by the latter; and there was an account between the plaintiffs and *Hovey, Williams & Co.* in respect of such transactions, and the remittances and payments on account thereof. *Coates & Co.* were during the same time, and until their suspension of payment after mentioned, a firm carrying on business in *London*, as merchants, and were also correspondents of *Hovey, Williams & Co.*

On 4th *September* 1847, *Hovey, Williams & Co.*, by *John Chandler*, a member of the firm then on a visit to *Europe*, addressed and sent to the plaintiffs several letters, which were set out in the case, but are omitted in the report as irrelevant (a).

(a) These letters were set out, subject to objections, on the part of the defendant, to their admissibility as evidence. On the argument, all the objections were waived; and it was agreed that the Court, in drawing

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On 17th *October*, 1847, the plaintiffs wrote to the said *John Chandler*, then in *England*, a letter, the material part of which was as follows. "You will find inclosed an account up to the 30th ulto., presenting in our favour a balance of francs 33,751. 65., without interest. Money being rather scarce in *Paris*, we would feel obliged to you if you would instruct Messrs. *Coates & Co.* to remit us some funds." The account, mentioned in the letter of 17th *October*, was the account of the plaintiffs with *Hovey, Williams & Co.* On 25th *October* 1847, *John Chandler* wrote to *Coates & Co.* a letter in which was enclosed the bill for 2000*l.* there mentioned. The letter was set out in the case at length. The material parts were as follows. "I have this day drawn a bill on Messrs. *Baring, Brothers & Co.*, four months' date, for 2000*l.* sterling, which I now enclose you for presentation. You will negotiate the bills upon the best possible terms." "You will also make up your account to date, and take the amount due. You will remit *Crofts & Still, Manchester*, 235*l.* 2*s.* 5*d.*, and the balance to *Poirier, Frères, Paris*." *Coates & Co.*, having received the bill for 2000*l.* mentioned in the foregoing letter, procured the same to be discounted, and received the proceeds, and charged *Hovey, Williams & Co.*, in account, with a commission of 5*s.* per 100*l.* on the amount of the bill for procuring such discount. Out of the proceeds of this bill, and another for 400*l.* in their hands, *Coates & Co.* paid themselves a balance then due to them from *Hovey, Williams & Co.* ;

conclusions of fact, should consider whatever was relevant, and neglect what was not so, whether strictly admissible or not. Those omitted in the report were various letters between *Chandler, Coates & Co.*, and *Poirier, Frères*, not bearing on the present transaction.

they also remitted to *Crofts & Still* the amount mentioned in that letter as there directed: and they then had a balance, of the proceeds of the 2000*l.* and 400*l.* bills, in their hands of 758*l.* 13*s.* 1*d.* In the mean time, on the 28th of *October*, *John Chandler* wrote and sent to the plaintiffs a letter containing this passage: "I have requested Messrs. *Coates & Co.* to make you a remittance; which they will do in a few days."

On *Friday*, 29th *October* 1847, which was a foreign post day, *Coates & Co.*, in their own names, through the medium of Messrs. *Croll & Stevens*, brokers of the city of *London*, arranged for the purchase from the defendants of the bill of exchange mentioned in the declaration; the price agreed on was at the exchange of 25 francs 70 centimes to the pound sterling, and amounted to 757*l.* 18*s.* The brokers charged *Coates & Co.* with a brokerage of 15*s.* 1*d.* in respect of the purchase of the bill; and which brokerage *Coates & Co.* charged to *Hovey, Williams & Co.* in the usual course of mercantile business. The price of the bill, and such brokerage, amounted to the said sum of 758*l.* 13*s.* 1*d.* The custom of merchants in the city of *London*, on the sale of foreign bills, is to arrange for and hand over the bill on one foreign post day without payment of the price agreed upon, and for the price to be paid on the next foreign post day; which in this case was *Tuesday*, 2d *November* 1847. This bill was accordingly handed over by the defendants to *Coates & Co.*, on the 29th of *October*, in accordance with the custom, and was to be paid for on the following *Tuesday* the 2d of *November*: but in the meantime *Coates & Co.* failed, on the 1st *November*; and the defendants were never paid by *Coates & Co.*, or any other persons, any part of the price of the bill, and have

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never received any value for the same. *Coates & Co.* made no charge of commission in respect of their services with reference to the purchase or remittance of the said bill. The case contained a copy of an account made out by *Coates & Co.* on 28th *October*. In this they credited *Hovey, Williams & Co.* with the proceeds of the two bills, amounting to 2400*l.*, and debited them with discounts and remittances; the last items on the debit side were,

			£	s.	d.
" Oct. 28.	Paid <i>Croft & Stell</i>	-	-	235	2 5
Oct. 29.	For Bill on Paris @ 5 days				
"	Remitted <i>Poirier, Frères</i>				
			£	s.	d.
"	Fcs. 19478.05 @ 25.70	757	18	0	
"	2s. $\frac{1}{2}$ cent. Brokerage	0	15	1	
					758 13 1"

Which exactly balanced the account.

The case then proceeded.

John Chandler, being examined for the plaintiffs before the master, stated, amongst other things, in his examination in chief, that, at the end of *October* 1847, he gave directions to *Coates & Co.* about a remittance to the plaintiffs; that he was at *Manchester* at that time; that the directions were given in writing; that, at the end of *October* 1847, the balance of accounts was in favour of *Hovey, Williams & Co.* about 750*l.*; that he knew nothing personally of the purchase and transmission of the bill on which this action was brought. It was proposed to ask him, on cross examination, the following question: 'In procuring the discount of that bill on *Baring, Brothers*, and applying the proceeds as directed by you, were *Coates & Co.* acting as your agents?' This question was objected to on behalf of the plaintiffs; and the same

was put, and the answer to the same was received, and returned by the master, subject to the objection. If the Court think the same inadmissible as against the plaintiffs, it is to be struck out of this case (a). He answered: "they were in that transaction acting for us; we never appointed them formally our agents." He said also, on re-examination: "The only authority *Coates & Co.* had was by my letter of the 25th *October* 1847. I had no personal interview with them." The following is a copy of the bill in question.

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Londres, le 29 *Octobre*, 1847. Pour fcs. 19,478.05

A cinq jours de date payez par cette première de change, la 2^{nde} et la 3^{me} ne l'étant, à l'ordre de Messieurs *Poirier, Frères*, la somme de dix neuf mille quatre cent soixante dix huit francs, cinq centimes, valeur de Messieurs *Coates & Co.*, que passerez suivant l'avis de *Morris, Prevost & Co.*

A M. *Are. Dassier*, *Paris*.

Coates & Co., on the 29th *October*, sent to the plaintiffs at *Paris* a letter with the bill enclosed: the material passage was: "We have the pleasure to hand enclosed a bill on your city, as described below, which please collect to the credit of Messrs. *Hovey, Williams & Co.*, *Boston*, owning receipt to Mr. *Chandler* and ourselves." The letter of 29th *October*, with the bill enclosed, was received by the plaintiffs in *Paris*, on *Sunday* the 31st

(a) On the case being read, Lord Campbell C. J. said that it was clearly inadmissible, as the question whether they were acting as agents was not in itself a fact, but a conclusion to be drawn from the other facts. But he suggested that it was not worth while to strike out the answer, as the Court, in forming their opinion as to whether *Coates* was an agent or not, would not be biassed either way by the witness's opinion. *Bramwell* acceded to this suggestion: and the objection was waived.

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of *October*. The plaintiffs afterwards, on or about the 30th *November* 1847, rendered an account to *Hovey, Williams & Co.*, in which the bill was not entered on either side. The plaintiffs' clerk, being examined for the plaintiffs in *Paris*, under a commission, and having shewn to him a copy of such account, proved that it was so rendered. He was then asked: "Whether or no such account was a true and correct account?" and gave the following answer: "It is, save that the plaintiffs have not debited or credited the bill in question." He was then asked: "When a bill is remitted to be placed to the credit of a correspondent, and such bill is either not accepted or not paid, is it the plaintiffs' custom, in the account rendered to the correspondent, to omit such bill on both sides of the account?" and answered: "When at the time they state the fact of the dishonour to their correspondent, they do not put the bill into the account; but otherwise they put it in on both sides." He was then asked: "Was the bill in question, when received, entered by the plaintiffs in their books as received on account of *Hovey, Williams & Co.*?" and answered: "It was." He stated also, on cross examination, that it was in consequence of the plaintiffs having addressed the letter of the 3d of *November* 1847, after mentioned, to Mr. *Chandler*, that the bill in question was not introduced into the account rendered to *Hovey, Williams & Co.*

The plaintiffs, on 31st *October*, sent to *Coates & Co.* a letter, stating that they had received the draft "on *A. Dassier*, which we have placed to the credit of Messrs. *Hovey, Williams & Co., Boston*, and will advise receipt of same to Mr. *Chandler*."

Before and on the 25th of *October* 1847, and thence

to the time of the receipt by the plaintiffs of the said bill, there was a balance on the said account between the plaintiffs and *Hovey, Williams & Co.* in favour of the plaintiffs, to the amount of 43,000 francs and upwards; and the account continued largely, and to an amount exceeding the bill in question, in the plaintiffs' favour until the bill was dishonoured, and for some time afterwards.

The bill was not presented for acceptance, but became due and was presented on the 3d of *November*; when, in consequence of directions from the defendants to the drawee, the same was, on the ground of its not having been paid for, refused payment. On that day, after the dishonour, the plaintiffs wrote to *Coates & Co.* and to *Mr. Chandler*, advising them of the dishonour of the draft. The bill was, on the 4th of *November* 1847, protested for non-payment; and the expences of protest were paid by the plaintiffs. The plaintiffs afterwards drew a redraft on the defendants for 770*l.* 16*s.* 7*d.*, the amount in sterling money of the dishonoured bill, which was returned to them. The case then set out a long correspondence, containing nothing material, except that *Hovey, Williams & Co.* had paid *Poirier, Frères* the whole of their account without taking credit for the bill remitted. The case then proceeded.

The said *John Chondler*, on his cross examination, also stated as follows. "This action will, if anything come of it, enure to the benefit of the late firm of *Hovey, Williams & Co.* The plaintiffs have no claim on the late firm of *Hovey, Williams & Co.* in respect of this bill, and have no beneficial interest in it."

The defendants' counsel, at the trial, admitted that the plaintiffs were entitled to a verdict on the 1st issue,

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on the plea of fraud: and it was then agreed that a verdict should be entered for the plaintiffs, subject to a special case, the Court to be at liberty to draw such inferences of fact as a jury would have done, and the plaintiffs to be at liberty to object to the admissibility of the said answer of the said *John Chandler* mentioned to have been objected to; the same to be struck out if not admissible: and the defendants to be at liberty to object to the admissibility of the letters above mentioned to have been objected to; and which are to be struck out if the Court consider them not to have been admissible: and that the Court should have power to order the pleadings to be amended in like manner as the Judge at Nisi prius; the defendant's counsel suggesting that they might ask for an amendment to the effect that the plaintiffs were suing only on behalf of *Hovey, Williams & Co.*, and as trustees for them. It was also agreed between the parties that the pleadings in this action on both sides (with any amendment, if ordered by the Court) should form part of this special case.

The questions for the opinion of the Court are, as to the admissibility of the answer of the said *John Chandler* before mentioned (*a*); and as to the admissibility of the letters before mentioned (*b*); and whether, upon the present pleadings or with such amendment, if any, as the Court may direct, the plaintiffs are entitled to recover on the first count: and, if the Court shall be of opinion that they are so entitled, then the verdict is to be entered for the plaintiffs for the damages found by the verdict, and for costs of suit: but, if the Court shall be of a contrary opinion, then a verdict is to be entered

(*a*) Ante, p. 95, note (*a*).

(*b*) Ante, p. 91, note (*a*).

for the defendants, except on the issue on the plea of fraud; upon which plea the verdict is to stand for the plaintiffs.

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Bramwell, for the plaintiffs. The only question is, whether the defendants have proved the special plea. In *Munroe v. Bordier (a)*, a similar case, arising out of the stoppage of the same firm of *Coates & Co.*, a plea to an action on a bill, stating the failure of *Coates & Co.* to pay the price, and denying that they ever gave value for the bill, was held bad on general demurrer, as not shewing that the plaintiffs in that action were holders without value. In the present case the defendants have, in addition to the averments contained in the plea in *Munroe v. Bordier (a)*, inserted averments, that *Coates* purchased the bill as agents for *Hovey, Williams & Co.*, and, as their agent, remitted the bill to plaintiffs, who received it to collect it for *Hovey, Williams & Co.*; and that there never was value as between *Coates* and *Hovey, Williams & Co.*; or between *Coates* and plaintiffs; and that the plaintiffs are holders without value. All these are material averments; *Munroe v. Bordier (a)*. No one of them is proved by the facts stated on the case. Those facts shew that there were three houses in three countries; *Hovey, Williams & Co.* in *Boston*, *Coates & Co.* in *London*, and *Poirier, Frères* in *Paris*; both the *European* houses being correspondents of the *American* house. The *American* house was, at the end of *October*, indebted on the balance of accounts to the *London* house and to the *Paris* house. In order to redress this state of things, the *American* house sent a bill for 2,000*l.* to

(a) 8 Com. B. 862.

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the *London* house, desiring them to collect it: the *London* house did do so: and, as the amount exceeded the balance due to them, the effect was that the *London* house became debtors to the *American* house. This had been expected; and the *American* house had, in the letter of *October 25*, desired them to make certain payments, and remit the balance to the *Paris* house. That remittance might be made in various ways. If the *London* house had funds of their own at *Paris*, they might draw on the person who held their funds there and remit by their own bill to *Paris*, just as *Hovey, Williams & Co.* remitted to *Coates & Co.* the 2000*l.* by their own draft on *Baring's*: or the *London* house might pay the money into a *London* bank and obtain a bank credit in *Paris*; or, if the exchange was in such a state as to make it profitable, they might send sovereigns; or they might adopt the more common course, and purchase a bill in the market. They had their option which course to pursue; and they chose the last. The first question is, whether, having done so, the averment in the plea, that *Coates* purchased the bill as agent of *Hovey, Williams & Co.*, and as such agent remitted it, is proved. The plea is not proved unless it be made out that *Hovey, Williams & Co.* were liable for the price of the bill; that is, that they were principals buying through an agent and might be sued for a bill sold to them. But, on the facts, *Coates & Co.* were the foreign correspondents of *Hovey, Williams & Co.*, not their clerks. They were debtors paying their debt, not agents. [Lord Campbell C. J. A debtor paying his debt by sending the money to a third person at the request of his creditor is in one sense the creditor's agent to pay the third person; but he can hardly be said to be his agent clothed with authority to

pledge his creditor's credit for the means of making that remittance.] Such an authority might be given by express agreement: but the question here is whether the Court, with its knowledge of mercantile usage, will draw the inference that it was given. [*Crompton J.* There are very many mercantile cases in which a person is employed as agent to buy, but without any authority to pledge his principal's credit. In the ordinary case of a *Liverpool* merchant purchasing cotton at *New Orleans*, the constant custom is to write to his correspondents there to buy cotton for him on commission. The *New Orleans* house buy as the *Liverpool* merchant's agents; they charge him the cost price and a commission for buying the cotton for him; but they cannot pledge his credit for the cotton. They must buy it on their own credit, or pay for it out of their own funds.] It is an example of the general rule, that credit is given to the home merchant, not to the foreign correspondent; *Pater-son v. Gandesequi* (a), *Smith v. Anderson* (b). The case of *Puget de Bras v. Forbes* (c) is relied on by the defendants. It can be supported only on the supposition that there was something in that case, not mentioned in the report, to shew that the purchaser of the bills was the agent of the plaintiff, buying the bill on his credit. Such might be the fact in that case. It is not so in the present. But, further, even if the *London* house of *Coates & Co.* and the *American* house of *Hovey, Williams & Co.* were so identified as to be the same, still the plaintiffs, who were creditors of *Hovey, Williams & Co.*, received the bill, not, as is stated in the plea, for collection on account of

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(a) 15 *East*, 62.(b) 7 *Com. B.*, 21.(c) 1 *Esp. N. P. C.* 117.

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Crowder, contra. If *Hovey, Williams & Co.* were the plaintiffs on the record, they could not sue; if that be so, as the nominal plaintiffs are *Poirier, Frères*, it will be necessary to ask leave to amend the plea so as to shew on the record that in fact the real plaintiffs are *Hovey, Williams & Co.* The letter of 25th October desires *Coates & Co.* to remit the balance to *Poirier, Frères, Paris*: surely that gave them authority as the writer's agents to remit in the usual way, and for that purpose to buy a bill. Might they not have gone with that letter and said they were buying for *Hovey, Williams & Co.*? [Lord Campbell C. J. A clerk might have done so; but *Coates & Co.* were foreign correspondents. Do you make no difference between the authority of a correspondent and a clerk? Is there any fact in the case, to shew that the defendants, in selling the draft, knew any one in the transaction but *Coates & Co.*, or gave credit to any one but them, or looked for payment to any one else till they failed?] The same observation might be made wherever there is an undisclosed principal; yet on his being discovered he may be charged. [*Crompton J. Thomson v. Davenport* (a) carried that doctrine farther than any other case; yet even there the Court make an exception, namely, the case where the principal is a foreigner. Perhaps that exception is rather one depending on the fact that it is the understanding that credit is given to the British merchant, than on a question of law (b); but I can hardly bring myself to believe

(a) 9 B. & C. 78. See note to *S. C.* in 2 *Smith's Lea. Cu.* 222.

(b) See *Wilson v. Zulueta*, 14 Q. B. 405.

that, as a matter of fact, the sellers of bills in the *London* money market trust to the unknown foreigner. . It happens in the present case that the unknown buyer was a very respectable *American* firm, which was known, and could no doubt have got credit ; but such would not be always the case.] *Puget de Bras v. Forbes* (a) is precisely in point as an authority for the defendants.

Then is any difference made by the circumstance that *Poirier, Frères* are the plaintiffs on the record ? [*Wightman* J. Why are they not bonâ holders for value ? On *October* 17 they are creditors of *Hovey, Williams & Co.* ; and the bill is sent them on account of that debt.] An antecedent debt is a consideration for a bill of exchange, only when there is an agreement to suspend the remedy for the debt till the bill is due ; *Baker v. Walker* (b). In the present case, though the bill is sent to the plaintiffs, they do not place it to the account of *Hovey, Williams & Co.* [*Erle* J. I have been in the habit of thinking that ninety nine promissory notes out of the hundred, good for anything, were given by a person already indebted to his creditor. Is it said that such notes are primâ facie without consideration ? *Crompton* J. The question does not arise ; for, on the facts, there is extremely strong evidence that the right of *Poirier, Frères*, to sue *Hovey, Williams & Co.* was suspended. They write to press for a remittance ; *Hovey, Williams & Co.* inform them that they have directed *Coates & Co.* to make them one. Then *Coates & Co.* send them this bill ; and they keep it. Now, if *Poirier, Frères*, had, after they received that bill, and before it was dishonored, commenced an action against *Hovey, Williams & Co.*, could they hope to per-

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suade a jury that the bill was not given and taken on account of the debt?] At all events, the action is now brought in substance by *Hovey, Williams & Co*: but, if the Court are clearly against the defendants on other points, it is useless to ask for an amendment.

Bramwell was not called upon to reply.

LORD CAMPBELL C. J. I am of opinion that, when this bill was dishonored, *Poirier, Frères* were holders for value, and had then a right to sue the defendants as drawers of the bill; and I am of opinion that they still retain that right, and that nothing has occurred to alter their position as against the defendants. Let us see the state of circumstances when the bill was first received by *Poirier, Frères*. They were creditors of *Hovey, Williams & Co*. They press their debtors for a remittance; *Hovey, Williams & Co*. say they shall have a remittance through *Coates & Co*. *Coates & Co*. accordingly send to *Poirier, Frères* this bill. When it was received under those circumstances, I think *Poirier, Frères* were bona fide holders for value, and that the debt due from *Hovey, Williams & Co*. to *Poirier, Frères* was ample consideration to make them so. Had the bill been accepted, *Poirier, Frères* would have had a right to retain it, and to receive the proceeds: I can see nothing in this part of the case to vary it from the ordinary one where a bill is received by a creditor as a security for an antecedent debt. But, though *Poirier, Frères* then had a right of action for their own benefit, they have since been reimbursed by *Hovey, Williams & Co*.; and the action is brought for their benefit. Does that make any difference? I think that, if the bill had in the first instance

been indorsed to *Hovey, Williams & Co.*, so that they were parties to the bill, and they were suing in their own name, they might recover. *Coates & Co.* were not agents for *Hovey, Williams & Co.* in the sense in which the word must be used to make the plea good. They were merchants in *London*, correspondents of an *American* house. They were creditors of that house, but receive a remittance exceeding the balance due to them, and, with it, directions to apply the surplus by remitting it to *Poirier, Frères*. As soon as they had received the remittance, they became debtors, and were exactly in the same situation as if there had been an antecedent debt, and they had received directions to remit that debt to *Poirier, Frères* at *Paris*. For that purpose they buy this bill from the defendants. In one sense they were agents for *Hovey, Williams & Co.*, but not in the same sense as that in which mere clerks or servants are agents. It is clear that the defendants had no right to recover the price of the bill from *Hovey, Williams & Co.*; for *Coates & Co.* had no authority to pledge the credit of *Hovey, Williams & Co.* for the bill. It is clear that, though *Coates & Co.* were agents in one sense, the credit was given to them exclusively, and there was no recourse against *Hovey, Williams & Co.* for the price; and, as far as concerns *Hovey, Williams & Co.* and the defendants, the rights on this bill are the same as if *Coates & Co.* had paid for the bill in cash. The defendants chose to run the risk of *Coates & Co.* becoming insolvent before the next foreign post day: that was not compulsory on them; it is a risk, however, ordinarily run by those who deal in the money market, and is compensated for by the profits made on other transactions, which could not be entered into by those not willing to give the customary credit.

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WIGHTMAN J. It seems to me impossible, upon these facts, to contend that there is any defence to this action. An *American* house, indebted to a *Paris* house, and creditors of a *London* one, instruct their *London* correspondents to remit the balance due to them to their *Paris* creditor. In pursuance of these instructions, and for the purpose of making the remittance, the *London* house buy, in the ordinary course, this bill from the defendants. For that purpose, they were already in funds: and, though, as between the *London* house and their *American* correspondents, the relation of agent and principals existed, yet, as between the *London* house and the defendants who sold the bill there, the *London* house, *Coates & Co.*, were principals only. There can be no doubt that *Coates & Co.* were the purchasers of the bill. The *American* house, *Hovey, Williams & Co.*, were not liable for the price; nor were they principals of *Coates & Co.*, as between them and the defendants. The defendants gave the customary credit; they were not bound to give it; but they chose to do so: they gave it, however, to *Coates & Co.*; they could not give it to *Hovey, Williams & Co.*; for no one had authority to pledge their credit. It is not, however, necessary to determine even this; for the plaintiffs are clearly holders for value. They are creditors; and the bill was sent to them as a remittance on account of their debt, when they had pressed for one. They were clearly holders for value; and I entertain no doubt they could sue, whatever was the state of things as between the defendants and *Hovey, Williams & Co.* What has occurred since does not alter their legal right. They have been reimbursed: and the beneficial interest has been transferred: but the legal interest is in them; and they may still sue as trustees.

ERLE J. It appears to me that, for the reasons given, the plaintiffs are bonâ fide holders for value. Also it appears to me that there is no evidence that *Coates & Co.* had authority to pledge the credit of *Hovey, Williams & Co.* for the price of the bill. They had no express authority; and I can see nothing from which such an authority might be inferred. They were agents to remit; but that is a kind of agency very different from an agency to buy, and for that purpose to pledge the principal's credit.

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CROMPTON J. In this plea there are two distinct averments: one, that *Coates* purchased the bill as agent for *Hovey, Williams & Co.*, and the other that the plaintiffs are holders without value. The defendants must make out both: I think they make out neither. First: Were *Coates & Co.* agents for *Hovey, Williams & Co.*, in such a sense that they could buy the bill, pledging their principal's credit for the price? It is enough to say that this is not made out by the defendants; but, on the evidence, as a matter of fact, I think it is proved that they had no such authority. And, as to the other point, I think the plaintiffs were holders for value. The letter of 31st *October* shews that on that day they received the draft, "which we have placed to the credit of Messrs. *Hovey, Williams & Co., Boston*, and will advise receipt of same to Mr. *Chandler*." So that, when they wrote that letter, the bill was, as between these parties, given and taken on account of the debt of *Hovey, Williams & Co.* There is nothing decisive either way in what is stated as to the accounts; the bill was not fully entered in their books; but from the 31st *October* they were entitled to keep that bill, as in fact they did,

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until the debt of *Hovey, Williams & Co.* was paid. Then *Hovey, Williams & Co.*, thinking themselves bound in honour to indemnify *Poirier, Frères*, pay them the money, and by so doing become entitled to the bill; but they take no indorsement from *Poirier, Frères*; so that the legal interest is not transferred. By what is, in effect, a sale of the equitable interest, they become trustees, but do not lose the legal right to sue. No doubt, if there was any defect in their title it would not be cured by this transfer of the equitable interest: but it is not prejudiced by it.

Verdict to be entered for plaintiffs.

Wednesday,
May 4th.

WILLIAM THOMAS, Appellant, *against* WILLIAM
HENRY STEPHENSON, Respondent.

An inspector
of weights and
measures,
under stat.
5 & 6 W. 4.
c. 63. s. 28.,
duly entered
a shop to ex-
amine weights,
measures and
weighing
machines.

APPEAL from the county court of *Berkshire*, holden at *Windsor*, in a plaint *Stephenson v. Thomas*. The plaint was for seizing and detaining the scales of the plaintiff. It was tried before a jury, when a verdict passed for the plaintiff. The defendant appealed, on the following case.

He seized and carried away as forfeited a pair of scales, and detained them after being requested to give them up. The owner sued in the county court: when the jury found that the scales were in fact unjust; that they were a weighing machine, and not a weight or measure; and that the defendant *bonâ fide* believed that he was acting in pursuance of the Act. Under the direction of the judge, the jury found for the plaintiff. On appeal on a case stating these facts.

Held: that, under stat. 5 & 6 W. 4. c. 63. s. 28., weighing machines are not forfeited though unjust, although weights and measures are: and, consequently, that the defendant was not authorized by that Act to seize the scales.

Held also: that stat. 5 & 6 W. 4. c. 63. ss. 39., 40. gives only privileges in pleading, and powers of tendering amends to defendants sued for things *bonâ fide* done in pursuance of the Act, but not authorized by it; and that it does not make *bona fides* in itself a defence. And, consequently, that the decision of the judge of the county court was right.

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At the trial, it was duly admitted in evidence on both sides, and taken as proved, that the plaintiff in this action was, at the time of the committing the alleged grievance by the defendant, carrying on the trade or business of a mealman, in a certain shop situate in the parish of *Eton*, and within the jurisdiction of the said county court; and that the defendant then was, and thence hitherto hath been, the inspector of weights and measures, duly appointed, under and by virtue of stat. 5 & 6 W. 4. c. 63., as such inspector for the hundred of *Stoke*, within which hundred the said shop of the plaintiff and the whole of the parish of *Eton* aforesaid is situate. It was further admitted that, on 1st *September* 1852, the defendant, as such inspector as aforesaid, and then acting under a general warrant, duly made and signed, according to the provisions of the said last mentioned statute, entered, at a seasonable time for that purpose, the said shop of the plaintiff, wherein goods were then exposed for sale, and examined the said scales of the plaintiff, and then seized and took therefrom and carried away the same, against the will of the plaintiff; that the same were of the value of 2*l.* 5*s.*; and that the defendant had, before action and still, refused to redeliver the same to the plaintiff. It was further also admitted that, at the time of such seizure of the said scales, the same were a weighing machine, and were incorrect and unjust; and that the defendant, throughout the whole transaction, acted *bonâ fide*, and seized and carried away the said scales under the *bonâ fide* belief that he was acting in pursuance and by the authority of the said last mentioned statute. The said scales were also produced in court by the defendant.

Upon these admissions, it was contended at the said

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trial, on behalf of the plaintiff, that, although weights and measures which were light or otherwise unjust might be liable to be seized and forfeited, weighing machines which were incorrect and unjust were not so liable; and, consequently, that the plaintiff was entitled to a verdict against the defendant for seizing, taking and carrying away the said scales as forfeited, it being admitted on the part of the defendant that the said scales were a weighing machine, and not a weight or measure. On the other hand, it was contended, on the part of the defendant, that, under the circumstances detailed above, he, as such inspector as aforesaid, was fully authorized and empowered, by and under the provisions of the said last mentioned statute, not only to enter the said shop of the said plaintiff, but to seize and carry away therefrom the said scales. It was further contended, on the part of the defendant, that, assuming that the defendant was not in point of fact authorized and empowered, by and under the provisions of the said last mentioned statute, to enter the said shop of the said plaintiff and to seize and carry away therefrom the said scales, yet, nevertheless, that, as it was admitted that the defendant, as such inspector as aforesaid, had acted *bonâ fide*, and in the *bonâ fide* belief that he was acting in pursuance and by the authority of the said last mentioned statute, he was under section 39 of the said statute entitled to a verdict in his favour: and to which latter contention it was replied, on the part of the plaintiff, that, although the defendant as such inspector as aforesaid seized, took and carried away the said scales in the *bonâ fide* belief that he was acting in pursuance and by authority of the said last mentioned statute, he was not on that ground alone entitled to the verdict; for, if scales, though incorrect and unjust, were

not liable to be seized and forfeited, and the defendant had in fact seized, taken and carried away the said scales, the verdict must pass against him notwithstanding such bonâ fide belief. The judge of the said county court, after these two points had been argued before him, and acting under the authorities cited before him, ruled, as to the first point, that, although the defendant had authority to enter the said shop, yet, upon the true construction of the said last mentioned statute, steelyards or other weighing machines, though incorrect and unjust, were not liable to be seized and forfeited; therefore the defendant had no right or authority to seize, take and carry away the said scales, it being admitted in evidence, and taken as proved, that the said scales were, at the time of such seizure and conversion, a weighing machine, and not a weight or measure. And, as to the last point, that the defendant was not entitled to the verdict simply because he had acted bonâ fide, and in the bonâ fide belief that he was acting in pursuance and by the authority of the said last mentioned statute, if, in fact, he had seized, taken and carried away the said scales, and they were not liable to be seized and forfeited. Whereupon a verdict passed for the plaintiff, the damages being agreed upon at the value of the said scales, viz. 2*l.* 5*s.*

The questions for the opinion of the Court are:

1. Whether, under the circumstances detailed above, the defendant, as such inspector as aforesaid, was authorized and empowered by and under the provisions of stat. 5 & 6 *W.* 4. c. 63., not only to enter the shop of the said plaintiff, but also to seize and carry therefrom the scales in manner aforesaid.

2. Assuming that the defendant was not in point of fact so authorized and empowered by and under the

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provisions of the said last mentioned statute, whether, as the defendant acted bonâ fide and in the bonâ fide belief that he was acting in pursuance and by the authority of the said last mentioned statute, he was not entitled to a verdict in his favour, although he in fact seized, took and carried away the said scales in manner aforesaid, and the said scales were not liable to be seized and forfeited.

The case was argued in this term (22d April) (a).

Bramwell, for the appellant. The first question depends on the construction of stat. 5 & 6 W. 4. c. 63. s. 28., by which the inspector is authorized at all seasonable times to enter any shop, and "there to examine all weights, measures, steelyards, or other weighing machines;" "and if upon such examination it shall appear that the said weights and measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l.*; and any person who shall have in his or her possession a steelyard or other weighing machine which shall on such examination be found incorrect or otherwise unjust, or who shall neglect or refuse to produce for such examination, when thereto required, all weights, measures, steelyards, or other weighing machines which shall be in his or her possession, or shall otherwise obstruct or hinder such examination, shall be liable to a like penalty." [Lord Campbell C. J. Scales are neither weights nor measures. *Wightman* J. It is necessary for your purpose to contend that they are weights, and are not weighing

(a) Before Lord Campbell C. J., *Wightman* and *Crompton* J.

machines. The language of the statute seems purposely framed to exempt the latter from forfeiture.] Then the other point depends on sect. 39: "that in all actions brought against any person for anything done in pursuance of this Act, or in the execution of the powers or authorities thereof, such action shall be laid and brought in the county within which the cause of action shall have arisen; and the defendant or defendants in such action may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and that the acts were done in pursuance and by the authority of this Act; and if they shall appear to have been so done, or that such action shall have been brought otherwise than as hereinbefore directed, then and in every such case the jury shall find for the defendant or defendants." The defendant acted in the bonâ fide and reasonable belief that he was authorized by the Act: the protection given by such an enactment would be nugatory, if confined to cases in which the defendant was justified without it; *Jones v. Gooday* (a). [Lord Campbell C. J. That may do for the seizure; but the defendant detains the scales. If no action lies for the detention, which was wrongful, how is the plaintiff to get them back?] Probably replevin lies; but the defendant is protected by the Act from any action against him for detaining them, so long as that detention is under the bonâ fide and reasonable belief that he is acting in pursuance of his authority. As soon as it is explained to him by a competent authority that he was wrong, he must give up the scales, or be liable to an action for any future detention, which will

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(a) 9 M. & W. 736.

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Griffits, contra, was directed to confine himself to the second point. Sect. 39 requires that actions such as this shall be brought in the county where the cause of action arose; and it also allows the defendant to give in evidence, under the general issue, any defence which he has; but it does not make anything a defence which would not, supposing there were no enactment altering the usual course of pleading, be matter for a special plea. Acts often entitle persons sued for "anything done in pursuance of the Act" to notice before action in order to enable them to tender amends, or impose conditions on the plaintiffs, such as that they shall lay the venue in the county. There are many cases which decide that the defendant is entitled to insist on the fulfilment of all such conditions, whenever he has acted in the bonâ fide belief that he was acting in obedience to the Act. The principle of those decisions is, that to confine the defence, arising from the non-compliance on the part of the plaintiff with those conditions, to cases in which the defendant had already proved a substantial defence, by shewing that he literally had acted in pursuance of the Act, would render the conditions nugatory. But there is no case in which it has been held that a plaintiff, who has complied with all the conditions imposed upon him, must nevertheless fail if the defendant acted bonâ fide, though wrongfully. In *Jones v. Gooday*(a) the question was, whether the defendant was entitled to the protection of a statute authorizing de-

(a) 9 M. & W. 736.

defendants sued for "anything done in pursuance of this Act" to tender amends. In *Stamp v. Sweetland* (a) the present point was argued; but the Court gave no decision on it: the authorities are collected in the report (b). No doubt the Legislature might enact that bona fides should be a substantive defence; but they shew no such intention here. Sect. 39 allows the defendant to give any actual compliance with the Act in evidence under the general issue. Sect. 40 enacts "that no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act," if sufficient amends be tendered before action, or paid into court. This would be superfluous if sect. 39 had already made it a substantive defence that the wrong was done in execution of the Act; unless indeed it was meant by sect. 40 to protect those who *malâ fide*, under colour of the Act, did a wrong, knowing it to be one. It would be strange if such persons were protected.

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Brammoell, in reply. Sect. 40 may be put in as a cumulative protection. A prudent man, threatened with a vexatious action, will tender a small sum and be safe. The words in sect. 39 are "in pursuance of this Act;" and it cannot be denied that, as far as the venue is concerned, those words mean something else than strictly justified by the Act. In sect. 40 the words are "in execution of this Act," which is a change of language indicating some intention to change the meaning.

Cur. adv. vult.

(a) 8 Q. B. 13.

(b) 8 Q. B. 18, note (h). See also *Mellor v. Leather*, 1 E. & B. 619.

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Lord CAMPBELL C. J., now delivered the judgment of the Court.

On a former day we intimated a clear opinion that the defendant was not justified by stat. 5 & 6 *W.* 4. c. 63. s. 28. in taking away the plaintiff's scales as forfeited, although they were *unjust*, and he incurred a penalty by keeping them: but we took time to consider whether the finding, that the defendant acted *bonâ fide* and in the *bonâ fide* belief that he was acting in pursuance and by the authority of that statute, entitled him to a verdict. It is impossible to lay down any general rule applicable to all the various statutes passed for the protection of public functionaries, who have made a mistake in the exercise of a statutable authority, honestly believing that they were justified by it. Parliament, in its omnipotence, might exempt them from all liability; although it seems more reasonable, and more in conformity with the policy hitherto pursued by the Legislature, only to free them from technical difficulties in conducting their defence, and to exempt them from the heavy costs which must follow a verdict against them, if they are willing to offer compensation for the wrong which they have unintentionally committed. The second question in this case depends entirely on the construction to be put upon sects. 39 and 40 of stat. 5 & 6 *W.* 4. c. 63. Looking only to the former of these two sections, there would be some ground for contending that, if the grievances complained of appear to have been done in pursuance of the Act, there shall be a verdict for the defendant, although not done under the authority of the Act, and although there has been no tender of amends and no payment of money into Court; but the following

section we think shews satisfactorily that the Act only meant to apply to procedure, without giving an absolute indemnity; for it goes on to enact that no plaintiff shall recover in any action for any irregularity or other wrongful proceeding in the execution of the Act, *if tender of sufficient amends shall have been made before action brought*, and that, if there has been no such tender of amends, the defendant may *pay money into Court*. Thus he is to be entitled to a verdict only on condition that he has tendered sufficient amends, or that he has paid into Court a sum which the jury may think an adequate compensation for the wrong suffered. Although there is some change of phraseology in this section, and the expression occurs "in the execution of this Act" instead of "in pursuance of this Act," it seems clearly to extend to irregularities where the party *bonâ fide* believed that in what he did he was justified by the Act. That being so, it is impossible to conceive that the Legislature intended, where such irregularities have occurred, to entitle the defendant to a verdict on simply proving that what he did *without the authority of the Act* he did *in pursuance of it*, i. e. in the belief that under the statute he was justified in doing it.

We are therefore of opinion that the county court judge was right in his decision of both questions, and that the appeal must be dismissed with costs.

Appeal dismissed.

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*Thursday,
May 5th.*

IN THE EXCHEQUER CHAMBER.

BODDINGTON *against* CASTELLI.This case is reported in 1 *E. & B.* 879.*Thursday,
May 5th.*FISHER *against* BRIDGES.

To an action upon a covenant by defendant to pay money, defendant pleaded that, before the making of the deed, it was unlawfully agreed, between plaintiff and defendant, that plaintiff should sell to defendant, and defendant purchase of plaintiff, and accept from him a conveyance of, land for a term, in consideration of a sum of money to be paid by defendant to plaintiff, "to the intent, and in order, and for the purpose, as the plaintiff at the time of the making the said agreement well knew," that the land should be sold by lottery, contrary to the statute. That afterwards, "in pursuance of the said illegal agreement," the lands were assigned for the term; and defendant made the deed to secure payment of a part of the purchase money to be paid by defendant to plaintiff, which remained unpaid.

DECLARATION, for that defendant, by his deed, bearing date 27th *October*, 1849, covenanted with plaintiff, for himself, his heirs, executors and administrators, that he, defendant, his heirs, executors, administrators and assigns should and would well and truly pay, or cause to be paid, to plaintiff, his executors, administrators and assigns, the sum of 630*l.* with interest thereon, after the rate of 5*l.* per cent. per annum, on 27th *April* 1850, without making any deduction or abatement on any account whatever; and also that, in case the said sum of 630*l.* should not be then paid, defendant, his executors, administrators or assigns, should and would thenceforth pay unto plaintiff, his

to be paid by defendant to plaintiff, "to the intent, and in order, and for the purpose, as the plaintiff at the time of the making the said agreement well knew," that the land should be sold by lottery, contrary to the statute. That afterwards, "in pursuance of the said illegal agreement," the lands were assigned for the term; and defendant made the deed to secure payment of a part of the purchase money to be paid by defendant to plaintiff, which remained unpaid.

Held a bad plea, on motion for judgment non obstante veredicto; for that it did not connect the deed of covenant with the effectuating the illegal purpose.

executors, administrators and assigns, interest for the same, after the rate aforesaid, by even and equal half yearly payments, until the same should be paid: Yet defendant did not pay to plaintiff on 27th *April*, 1850, the principal sum of 630*l.*, or any part thereof: and the same is still unpaid &c.

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Plea 1: "That, before the making of the said deed in the declaration mentioned, it was unlawfully agreed, by and between the plaintiff and the defendant, that the plaintiff should sell, assign and transfer to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of, certain lands and houses, for the residue of a term of years, subject to a certain mortgage thereon, and to the payment of a certain sum of money, at and for and in consideration of a certain sum of money to be therefore paid by the defendant to the plaintiff, to the intent, and in order, and for the purpose, as the plaintiff at the time of the making the said agreement well knew, that the said lands and houses should be exposed to sale, and sold by way of lottery, or by lots, tickets, numbers or figures, or by a method or device depending upon or to be determined by lot or drawing, contrary to the form of the statutes in such case made and provided: And the defendant further says that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold, transferred and assigned for the residue of the said term of years, subject as aforesaid: and, a part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid, the defendant, to secure the payment thereof to the plaintiff, made the said deed and covenant in the declaration mentioned; the said 630*l.* being parcel of that money."

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There was also a second plea.

The replication took issue upon both pleas.

On the trial, before Lord *Campbell* C. J., at the *Middlesex* sittings after last *Hilary* term, a verdict was found for the defendant on the issue upon the first plea, and for the plaintiff on the issue upon the second.

In this Term, *Chambers* obtained a rule *Nisi* to enter judgment for the plaintiff non obstante veredicto on the first plea.

Hugh Hill and *Ball* now shewed cause. The rule is obtained on the ground that the first plea shews no illegality, the contract, as there described, not having for its object the effecting an illegal or immoral transaction. *Wettenhall v. Wood* (a) and *Simpson v. Bloss* (b) were cited upon moving. In *Wettenhall v. Wood* (a) it was held by Lord *Kenyon*, at *Nisi prius*, that money lent for the purpose of enabling the borrower to gamble might be recovered as a simple contract debt, because stat. 9 Ann. c. 14. s. 1. only avoids notes and other securities for repaying money so lent. The objection here does not arise upon that statute. In *Simpson v. Bloss* (b) it was laid down that, where a cause of action is impeached as tainted with illegality, the action is maintainable or not according as the claim can or cannot be made out without calling in aid the transaction which is illegal. Certainly that test would not defeat the plaintiff here, inasmuch as in the action of covenant it is not necessary to shew the consideration at all. But this shews that the test is inapplicable to a case where it is the peculiar form of action which makes such proof

(a) 1 *Esp. N. P. C.* 18.

(b) 7 *Taunt.* 246.

unnecessary. The general rule is that, where a consideration is illegal so that an action for simple contract could not be maintained upon it, there, if the contract be upon a specialty, the illegality of the consideration may be pleaded and shewn; *Collins v. Blantern* (a). [Crompton J. I understood the ground of the motion to be that it appeared that the illegal object had been effected before the contract was made, only that the money was not paid: and that it did not appear that the contract to pay the money operated in effecting the object, but the contrary appeared.] The authorities shew that, where a transaction is prohibited by positive law, whether malum in se or not, no action will lie, either for the price of that which has been purchased for the purposes of effecting the transaction, or upon any security given for the price. In *De Begnis v. Armitstead* (b) the plaintiff had joined with defendant in conducting an unlicensed theatre, and had advanced money for carrying on the performances, and was, on the settling of accounts, entitled to a balance; and it was held that the facts constituted a defence to an action on the money counts in respect of this balance. There *Tindal* C. J. cited the words of *Holt* C. J. in *Bartlett v. Vinor* (c): "Every contract made for or about any matter or thing which is prohibited or made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Langton v. Hughes* (d), *The Gas*

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(a) 2 Wils. 341, 347. See notes to *S. C.*, 1 *Smith's Lea. Ca.* 168.(b) 10 Bing. 107. See *Pidgeon v. Burslem*, 3 *Exch.* 465.(c) *Carth.* 251.(d) 1 *M. & S.* 593.

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Light and Coke Company v. Turner (a), *Cannan v. Bryce* (b), *M'Kinnell v. Robinson* (c), *MacGregor v. Lowe* (d), are instances of application of the same rule. In some early cases a distinction has been suggested between acts which are mala in se, and those which are merely prohibited by express law. But the authorities cited shew that the rule applies to cases of statutory prohibition. Here stat. 12 G. 2. c. 28. s. 1. prohibits the transaction which is shewn in the plea. In the earlier statute, 10 & 11 W. 3. c. 17. s. 1., lotteries are declared to be "common and public nuisances," and grants, patents and licences for such or any other lotteries to be "void and against law." [Lord Campbell C. J. You have to shew that, supposing no action would lie to recover money advanced for the illegal purpose, it follows that no action can be maintained on a covenant to pay the money, executed after the purpose is effected.] The security given for the repayment of such money is void; *Paxton v. Popham* (e), where *Lightfoot v. Tenant* (g) was cited, in which case the Court of Common Pleas upheld pleas much resembling that now in question. [Lord Campbell C. J. A bond given in consideration of the obligor having seduced the obligee, and of past concubinage, may be enforced.] Of course there is nothing illegal in a bond given to secure the amount of damages which have been caused by the acts of the obligor. Here there is an illegal purpose at first, which taints all that can be considered part of the same transaction. [Lord Campbell C. J. The plea is consistent with the supposition that the lottery had been abandoned.] The

(a) 5 *New Ca.* 666.(c) 3 *M. & W.* 434.(e) 9 *East*, 408.(b) 3 *B. & Ald.* 179.(d) 1 *C. & P.* 200.(g) 1 *B. & P.* 551.

parties have done all they could to carry it out, so far as concerns the purchase of the land for which it is now sought to recover the price.

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M. Chambers and *H. Hawkins*, contra. The plea in no way shews this covenant to have been instrumental in carrying out the illegal purpose. In *Williams v. Paul* (a) a party contracted for the purchase of a heifer on a *Sunday*: but, having kept her afterwards, he was held liable for the value on a quantum meruit. Suppose, in that case, the defendant had, on the *Monday*, given a promissory note for the price: could not that have been enforced? [*Erle J.* There seems to be some distinction between contracts which are illegal, and those as to which the law only says that they shall not be enforced: the latter class can hardly taint all the subsequent steps.] In *Petrie v. Hannay* (b) two parties jointly employed a broker in an illegal stock-jobbing transaction: one of them, with the privity of the other, paid the broker money for the differences; and it was held that the party paying might recover from the other. Wherever a *prima facie* case can be made without calling in aid the illegal agreement, the action will lie. But here the plea does not shew that the purchaser was bound to apply the land to the illegal purpose, or that in fact the land was illegally sold: and then the covenant is entirely subsequent to the conveyance. Suppose a tenant takes a lease, intending, with the lessor's knowledge, to apply the land to an illegal purpose, but the lease not containing anything to make it void in the event of the land not being so applied, and the term elapses without the

(a) 6 *Bing.* 663.(b) 3 *T. R.* 418.

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purpose being effected: is the tenant not liable for the rent? Or suppose an original illegal intention abandoned at the time of the actual lease. That would be very much the present case. In *Jones v. Waite* (a) it was held that, although a husband cannot sell his consent to separate from his wife, yet, if he agree with a third person to execute a deed of separation in consideration of money being paid to him, he may, upon executing the deed, maintain an action for the money.

Lord CAMPBELL C. J. I am of opinion that there must be judgment non obstante veredicto. The plea discloses nothing to shew that the deed on which the action is brought is illegal. It sets out an agreement between the parties, illegal under stats. 10 & 11 *W.* 3. c. 17. and 12 *G.* 2. c. 28. But it does not shew that the deed was given under this agreement: indeed it excludes the presumption of the fact having been so. It states that, in pursuance of the agreement, the lands were sold for the residue of the term: that takes place after the agreement. But the deed is made after this transfer: it is to secure the payment of the price, which had in part remained unpaid. *Paxton v. Popham* (b) and *Lightfoot v. Tenant* (c) may be supported on the supposition that the securities given in those cases were given under, or in contemplation or furtherance of, the original illegal agreement. But here any such supposition is excluded. We must here suppose that, after the transfer, there was a new agreement: and, though the

(a) 9 *Cl. & Fin.* 101, affirming the judgment of Exch. Ch. in *Jones v. Waite*, 5 *New Ca.* 341, which affirmed that of C. P. in *Waite v. Jones*, 1 *New Ca.* 656.

(b) 9 *East*, 408.

(c) 1 *B. & P.* 551.

party giving the security had become indebted in consequence of the completion of an illegal agreement, I see no illegality in such new agreement. There is no attempt to cover an illegal lottery; for anything that appears the illegal lottery may have been abandoned, and the party who purchased the land may have been using it for a legal purpose, and may have thought himself bound, as a point of conscience, to pay for it. I cannot see that this involves any infraction of the statute law, or of morality. When we see money given in consideration of an act which is and always must be illegal, as for instance a murder, there a contract to pay the money would be illegal. But here it was not immoral to pay for the land, but the contrary; quite as much so as, after the seduction of a female, it is a moral act for the seducer to execute a bond to compensate her: that originates, no doubt, in an act which is a violation of morality; but the bond is not illegal. How then is the execution of the deed in this case shewn to be contrary to the statute law or to morality? Consistently with what appears on this record, the deed may have been given most conscientiously in consideration of a benefit received. The supposition upon which *Parton v. Popham* (a) and *Lightfoot v. Tenant* (b) may be supported must be excluded: and the delivery of the deed here appears to be, not only not illegal, but laudable. There must therefore be judgment non obstante veredicto.

WIGHTMAN J. I am entirely of the same opinion. If the deed had been executed in order to carry into effect an illegal object, or in pursuance of an illegal contract,

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(a) 9 East, 408.

(b) 1 B. & P. 551.

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no action could have been maintained upon it. But the plea shews that it was executed, neither for the purpose of carrying such an object into effect, nor in pursuance of such an object. That is the great ground of distinction between this case and the cases of *Paxton v. Popham* (a) and *Lightfoot v. Tenant* (b). From the reports of those cases it would appear that the contracts there were made, either for the purpose of effecting an illegal object, or in pursuance of it. That supposition is here excluded. From the terms of the plea it appears that some part of the money had been paid, and that the defendant gave the deed as a security for the rest : that is not shewn to be more than a mere voluntary act on his part, and one not necessary for carrying the illegal purpose into effect. As far as he was concerned, all that was illegal was past and done: but, having got the land, he voluntarily executes a deed to secure the payment. That is not an act within the principle upon which acts are set aside as illegal.

ERLE J. I also think that there should be judgment non obstante veredicto. An action upon a covenant is maintainable though there be no consideration: but, if there be illegality in the transaction, that may be shewn as a defence. The plea here sets up an illegal contract, and goes on to shew that, after the money was due, this covenant to secure the payment of it was executed. I draw a distinction between cases where the object of the contract is to carry out an illegal purpose as yet unexecuted, and cases where the illegal purpose has come to an end, and the party only says I owe you something for having broken my illegal promise to you,

(a) 9 *Eust*, 408.(b) 1 *B. & P.* 551.

and I give you this security to indemnify you. I go the length of saying that whatever is entirely posterior to the illegal act may be supported, as not being tainted with the illegality.

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CROMPTON J. I am of the same opinion. A deed can be avoided for illegality only by shewing that it is connected with an illegal transaction, as being itself part of the plan for effecting it: where the plan, for instance, is to give a bond; or where a bond is conditioned for acting in conformity with the plan. That would be tainted with the illegality, and would be void. But here I see nothing illegal. Where a party acquires land by an illegal transaction, and repents, there is nothing illegal in paying for the land, or in giving security for payment. It really comes to the old case of a bond given in consideration of past cohabitation. *Beaumont v. Reeve (a)* was an action upon a simple contract, where the seducer promised to pay the female seduced money as a compensation for the injury: there the action failed, not because the consideration was illegal, but for want of any legal consideration. There was nothing to support it. But it has been held, over and over again, that a bond given under such circumstances is good. Why? Because there is nothing immoral in making such a payment, and therefore there is nothing to taint the instrument; though, if the contract required the aid of what had passed, there would be nothing to support the contract. This principle may account for the decisions on bills of exchange. In the two cases most relied upon, the contract may have been entered into in contempla-

(a) 8 Q. B. 463.

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tion of the illegal act. But I cannot find that it has ever been put that a contract made after the illegality is over, and forming no part of the original transaction, is void. No doubt in the present case the plea would have been that the deed was executed to carry out the illegal purpose, had the facts been such as to support such a plea.

Rule absolute (a).

(a) *Ball*, on May 6th, obtained a rule calling on the plaintiff to shew cause "why the defendant should not be at liberty to suggest upon the record, under the Common Law Procedure Act, 1852, sect. 143, the material fact omitted in the 1st plea: namely, that" &c., (setting out the facts proposed to be suggested). The rule was obtained on the affidavit of the defendant's attorney that "he has been informed and believes, that" &c. (the affidavit here set forth all the averments proposed to be suggested) "are true in substance and in fact."

Montague Chambers and *H. Hawkins*, in *Trinity* term (June 13th), shewed cause; and *Hugh Hill* and *Ball* were heard in support of the rule.

LORD CAMPBELL C. J. We must act as in *Manley v. Boycot* (ante, p. 46), and say that the party who seeks to take advantage of this enactment must lay before the Court clear and satisfactory proof that the suggestion is true. In this case the affidavit is not sufficient.

ERLE and CROMPTON Js. concurred. (COLERIDGE J. had left the Court.)

Rule discharged.

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DUGDALE *against* The QUEEN.Thursday,
May 5th.

(In Error.)

CLARKSON, in last term, obtained a rule calling on the plaintiff in error to shew cause why he should not be again apprehended and recommitted to the custody of the keeper of the House of Correction, at *Clerkenwell*, in and for the county of *Middlesex*, in execution of the judgment in this prosecution.

From the affidavit in support of the motion it appeared that the plaintiff in error had been convicted of a misdemeanour, at the *Middlesex* General Sessions, and sentenced to two years' imprisonment on each count of the indictment, and, at the end of the two years, to enter into recognizances to be of good behaviour for twelve calendar months further. A writ of error to the Court of Queen's Bench was issued: and, upon argument, on 15th *January* 1853, the judgment was reversed as to the 2d, 5th and 7th counts, but affirmed as to the 1st, 3d, 4th and 6th counts (a): and he was recommitted to prison.

D., being convicted of a misdemeanour at the Sessions, was sentenced to imprisonment: he brought error in the Court of Q. B., which affirmed the judgment: and he was recommitted to prison. He then brought error in the Exchequer Chamber, and entered into a recognizance conditioned to prosecute the writ of error, and abide the judgment of the Court, "and, in case of the affirmation of the judgment against which error is assigned," to "surrender

himself personally to be dealt with as our Court of Exchequer Chamber may order." He was then discharged by a Judge at Chambers. Afterwards the recognizance was filed in this Court.

Held: that the discharge was improper, the condition of the recognizance not being in conformity with stat. 8 & 9 *Vict* c. 68. s. 1.: and this Court made absolute a rule for apprehending and recommitting *D.*

The form of the recognizance did not appear from the affidavits. Held, nevertheless, that this Court would notice it, on the argument of the rule, as it was on the files of the Court. Although it was headed "In the Exchequer Chamber."

(a) *Dugdale v. The Queen*, 1 *E. & B.* 435.

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On 7th *April*, he issued a writ of error to the Court of Exchequer Chamber. On 9th *April* he was discharged from prison without notice to the prosecutor, on putting in bail to prosecute the writ of error, but without filing recognizance of bail at the Crown Office. It was deposed, from information obtained at the Crown Office, that a recognizance was there filed on or about 13th *April*, and that no certificate of such filing had been issued under the provisions of stats. 8 & 9 *Vict. c. 68. s. 2.*, 9 & 10 *Vict. c. 24. s. 4.* And that the last writ of error was issued, without a new fiat from the Attorney General, on certificate of counsel that no new fiat was necessary. Inquiries were made, on the part of the prosecution, at the *Clerkenwell* House of Correction whence the plaintiff in error was discharged, upon what authority he had been discharged: when information was given that he had been discharged by the order of a Judge; but the informant refused to say what Judge had made the order, or to give other information.

The recognizance was not set out in the affidavit, but was in Court on the file. It was headed "In the Exchequer Chamber," and acknowledged on 9th *April*, 16 *Vict.*, before *Platt* B. at chambers; and was conditioned "that, if the said *William Dugdale* does, at his own proper costs and charges, duly carry out, prosecute and cause to be argued in Our Court of Exchequer Chamber, before Our Justices and Barons of the degree of the coif, a certain writ of error sued out by him, the said *William Dugdale*, upon a certain indictment for misdemeanour, at the first sitting of Our Court of Exchequer Chamber in next *Easter* Term, and abide the judgment of the Court thereon, and, in case of the affirmance of the judgment against which error is as-

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signed, shall surrender himself personally to be dealt with as Our Court of Exchequer Chamber may order, then this recognizance to be void," &c.

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W. J. Metcalfe now shewed cause. The rule was obtained on several objections to the proceedings. [Lord Campbell C. J. Stat. 8 & 9 Vict. c. 68, s. 1. requires that the recognizance be conditioned, in case the judgment be affirmed, "forthwith to render the said defendant or defendants to prison, *according to the said judgment*, where imprisonment shall have been adjudged." Here your recognizance is conditioned only "to abide the judgment of the Court" of Exchequer Chamber, "and, in case of the affirmance of the judgment," to "surrender himself personally to be dealt with as Our Court of Exchequer Chamber may order." If you cannot get over that objection, it is useless to discuss the others. *Clarkson*, in support of the rule, remarked that it was doubtful whether the Court of Exchequer Chamber had power to commit to prison.] The recognizance in effect does more than the statute requires. At any rate, the Court cannot take notice of the fault, if it be one, in the recognizance, which is not brought before the Court by affidavit. [Lord Campbell C. J. Our own officer puts the recognizance into our hands; and we look at it. That is consistent with the practice of this and every other Court.] This recognizance is headed "In the Exchequer Chamber." [Lord Campbell C. J. We find it on our file.]

Clarkson, contra, was not called on.

LORD CAMPBELL C. J. I have no doubt that the

1853. plaintiff in error was improperly discharged, contrary to both the letter and the spirit of the statute.

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WIGHTMAN, ERLE and CROMPTON Js. concurred.

Rule absolute (a).

(a) See stat. 16 & 17 Vict. c. 32.

Friday,
May 6th.

JAMES KEYSE *against* THOMAS POWELL.

A close, held by copyhold tenure, contained an unopened coal mine. *B.* was tenant, from year to year, of the close to the copyholder in fee: *B.* in fact occupied the surface; and it did not appear that in the demise to *B.* there had been any exception or reservation of

the mine. While *B.* was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to *B.* and *P.* In 1832 *B.*'s tenancy from year to year ceased. Held that, before and at the time of the grant of 1821, *B.* was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine: that he therefore, by the grant, became possessed of the mine for the term without actual entry; and that his possession enured to the benefit both of himself and *P.*; and therefore *B.* and *P.* were both possessed of the mine from the time of the grant, and had not a bare interesse termini.

In 1847, the assignee of *B.* and *P.*'s term entered upon and worked the mine: upon which the copyholder in fee brought trespass.

Held: that the assignee was entitled to a verdict upon an issue on a plea that the close was not plaintiff's.

The assignee also pleaded the grant specially, and justified entering under it. The plaintiff replied that the right of entry had not accrued within twenty years, under stat. 3 & 4 W. 4. c. 27.; which the defendant traversed. Held that, upon this issue also, the defendant was entitled to the verdict.

TRESPASS. The declaration (of 3d *July* 1849) complained that defendant heretofore, to wit 1st *December* 1847, and on divers other &c., broke and entered divers, to wit two, closes of plaintiff, situate &c., called &c., subverted the soil, dug mines, pits, shafts and holes, and out of the mines &c. raised and got large quantities of earth, soil, minerals and coals of plaintiff, of and belonging to and parcel of the said closes, and took and carried away and converted &c.

Plea: 1. Not Guilty. Issue thereon.

2. That the said closes, earth, soil, minerals and coals were not, nor was any &c., the closes &c. of plaintiff, in manner &c. : conclusion to the country. Issue thereon.

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3. That the closes in which &c. now are, and at the several times when &c. were, and from time immemorial have been, within and parcel of the manor of *Abercarne* in the county of *Monmouth*, and customary tenements of the said manor, demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same, in fee simple or otherwise, at the will of the lord of the manor, according to the custom of the manor. That, long before any or either of the said times when &c., to wit on 19th *February* 1820, the then lords of the said manor, to wit &c., at their court baron, then holden in and for the manor, before the then steward of the court of the manor, to wit &c., according to the custom of the manor, by copy of the court rolls of the manor, granted to one *Edmond Lewis* the said closes in the declaration mentioned, and each of them, to hold the same to the said *Edmond Lewis*, his heirs and assigns for ever, by copy of the court rolls of the manor, at the will of the lords of the manor, according to the custom &c. By virtue of which said grant the said *Edmond Lewis* afterwards, and before any of the said times when &c., to wit on the day and year last aforesaid, entered into and upon the said closes and each of them, and became and was thereof seised in his demesne as of fee, at the will of the lords of the manor, according to the custom, &c. And, the said *Edmond Lewis* being so seised as aforesaid of the said closes in which &c., afterwards, and before any of the said times

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when &c., to wit on 3d *March* 1821, by a certain indenture then made between the said *Edmond Lewis* of the one part, and one *Richard Branthwaite* and one *Thomas Prothero* of the other part (profert), the said *Edmond Lewis* did grant, demise, lease and to farm let unto the said *Richard Branthwaite* and *Thomas Prothero*, their executors, administrators and assigns, all the veins of coal that then were, or should or might thereafter during the term thereby granted be found out or discovered, in, upon or under the said closes in which &c., together with full liberty, power and authority, at all times during the said term thereby granted, by all the usual and accustomed means whatever, to search for, work, raise, get up, convey and carry away all the said coal; also full liberty &c. (to carry other coal along the roads or levels). To have and to hold the said veins of coal, and all and every the powers and authorities thereby demised, unto the said *Richard Branthwaite* and *Thomas Prothero*, their executors, administrators or assigns, from the day of the date thereof, for and during and unto the full end and term of ninety nine years then next ensuing; yielding and paying for the same, unto the said *Edmond Lewis*, his heirs and assigns, the yearly rent of a peppercorn, if the same should be lawfully demanded, at or upon &c. And also yielding and rendering unto the said *Edmond Lewis*, his heirs and assigns, for and during such part of the said term as coal should be got and worked from the said closes, one tram of coal monthly. By virtue of which said demise the said *Richard Branthwaite* and *Thomas Prothero* afterwards, to wit on the said 3d *March* 1821, entered into and upon all and singular the said premises, powers and authorities by the said indenture granted,

with the appurtenances, and became and were possessed thereof, and interested therein, for the said term so to them therein granted as aforesaid. The plea then averred several assignments of the term, and entry and possession under each assignment, the earliest being an assignment of *Branthwaite's* moiety on 30th *June* 1826 : and finally the whole interest in the term was regularly traced to the defendant, who took the same under an indenture of 29th *November* 1842. By virtue of which last mentioned indenture defendant afterwards, and during the continuance of the said term by the said indenture granted, which is not yet expired, and before any or either of the said times when &c., entered into and upon the said premises, powers and authorities, and became and was possessed thereof for the said residue of the said term so therein granted as aforesaid, which is not yet expired, and remained and continued so possessed thereof until and at and after the said several times when &c. Wherefore defendant, at the said several times when &c., in a lawful, proper and reasonable manner, in that behalf, did enter the said closes in the declaration mentioned, in order to search for, work, raise, get up, convey and carry away the coal &c. Which are the said several alleged trespasses &c. Replication: That defendant entered upon the said closes in which &c., and committed the said trespasses in the declaration mentioned, after the making and passing of a certain Act &c. (3 & 4 *W. 4. c. 27.*), and also after the 31st day of *December* 1833, to wit on 1st *December* 1847. That the said supposed right to make such entry did not first accrue to the said *Richard Branthwaite* and *Thomas Frothero*, or to any other person through whom the defendant claims the said interest in the said closes

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1853. in which &c., or to the defendant, within the true intent and meaning of the said Act, at any time within twenty years next before the making of the said entry. By reason whereof, and of the said period of twenty years next before the making of such entry having fully expired before the making of the same, without such right of entry having first accrued as aforesaid at any time during the said last mentioned period, the right of the defendant to make such entry as aforesaid had been extinguished, according to the form and effect of the said statute, before and at the said several times when &c. Verification. Rejoinder: That the right to make the said entry did first accrue within twenty years next before the making of the said entry: conclusion to the country. Issue thereon.

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On the trial, before *Williams J.*, at the *Monmouthshire* Summer Assizes, 1852, it appeared that the alleged trespass was committed by the defendant working the mine in the third plea mentioned. This took place in the year 1847. It was shewn that the places were copyhold of the manor, and that the several conveyances were effected as stated in the third plea, and according to the dates there given: but the jury found that, down to the act complained of, there had been no actual entry upon or working of the mine. The grant of 1821 purported to be made in consideration of 500*l.* paid by the two grantees to the grantor. It further appeared that, before and at the time of the grant of the term, *Branthwaite*, one of the grantees, was tenant from year to year, to the grantor *Edmond Lewis*, of the land under which the mine lay, and was in actual occupation of the surface. It did not appear by what conveyance this tenancy was created, nor whether there was any

exception or reservation of the mine. *Branthwaite* continued so to occupy the surface until his death, which occurred in 1831: and, in 1832, his executrix gave up possession of the surface to the then copyholder in fee. The copyhold estate in fee was shewn to have legally come to *John Rees*; who, at a court held on 19th *February* 1839, surrendered to the use of *Barbara Keyse*, wife of the plaintiff, and daughter of *Edmond Lewis*, to her use and behoof for life, remainder to the use and behoof of the customary heirs of her body by the plaintiff, and, in default of such issue, to the use and behoof of the plaintiff, his customary heirs and assigns: and *Barbara Keyse* was thereupon admitted to hold to the several uses aforesaid. She was living at the time of action brought.

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The learned Judge, upon this evidence, directed a verdict for the plaintiff on all the issues, reserving leave to move to enter a verdict for defendant on the issues upon the second and third pleas. In *Michaelmas* Term, 1852, *Watson* obtained a rule *Nisi* accordingly.

The case was argued in last *Hilary* (a) and *Easter* (b) Terms.

Whately, Keating and *J. Gray* shewed cause.

First, as to the issue on stat. 3 & 4 *W. 4. c. 27*. The action is brought upon a trespass committed in 1847: and the question is, whether the entry of the defendant then made was barred by the statute. It is so barred,

(a) *January* 28th, 1853, before Lord Campbell C. J., Coleridge, Wightman and Erle Js.: and *January* 29th, 1853, before Lord Campbell C. J., Coleridge and Erle Js.

(b) *April* 21st 1853. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

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under sects. 2, 3, unless a right of entry in the mine first accrued to the defendant, or some one through whom he claims, within the twenty years preceding 1847. The defendant insists on the lease of 1821, that is, on the estate or interest assured by an instrument "other than a will:" but, under this, the right first accrued at the time when the lessee "became entitled to such possession or receipt by virtue of such instrument:" The right of entry was therefore barred in 1841, and ever since. In answer to this, the defendant will contend that the lease, being for valuable consideration, had the effect of a bargain and sale for the term of ninety nine years (not requiring enrolment, under stat. 27 H. 8. c. 16., as conveying no estate of freehold), and that the Statute of Uses, 27 H. 8. c. 10. s. 1., vested the possession in the lessee. But the Statute of Uses does not extend to copyhold lands; *Rowden v. Malster* (a), *Walker v. Walker* (b), *Gilbert on Tenures*, p. 182, 1 *Scriven on Copyholds*, p. 86 (c). The lease therefore operated only at common law, and, till actual entry, gave no possession, but only an interesse termini; *Doe dem. Rawlings v. Walker* (d), *Co. Litt.* 270.a., *Wheeler v. Montefiore* (e). Further, the defendant insists that *Branthwaite*, being already in possession of the surface as tenant from year to year, was also in possession of the mine, and therefore could not actually enter, upon taking the lease of the mine; so that the possession would be only continued under the lease. But, first, *Branthwaite* would, by taking the lease, be estopped from denying that the lessor, under

(a) *Cro. Car.* 42. 44.(b) 1 *Ves. Sen.* 54.

(c) 4th edition.

(d) 5 *B. & C.* 111. 119.(e) 2 *Q. B.* 133.

whom the plaintiff claims, had power to grant the mine. Secondly, the lease was to him and another, *Prothero*. Now supposing that, where a tenant from year to year takes a lease of a longer term to himself alone, the possession is, *primâ facie*, to be construed as continuing without interruption under the lease, that presumption is negatived where the new interest is not given to the same party, but to him and another jointly. That the possession of the surface does not necessarily carry with it the possession of the mine appears from *Rich dem. Lord Cullen v. Johnson* (a), where the lord of the manor, in actual possession of the manor, was barred by a twenty years' possession of the mine, in ejectment for the mine: and the same principle is shewn from *Curtis v. Daniel* (b). The possession of the surface and the mine may go together: but the two may be separated; and then they are as distinct as several closes; *Humphries v. Brogden* (c). The defendant is in the position of a party who, having a term in an upper chamber, takes a lease of a lower one: he must enter into the lower chamber, or he will not be possessed of it. The plaintiff's possession of the land, including the mine, is derived from his wife: a surrender was made to her, and she was admitted thereon, in 1839; and the plaintiff thereupon, without further conveyance, was possessed in her right. But the defendant is not copyholder: he has never been admitted himself, nor has any one through whom he claims been admitted: even a surrender, without admittance, would not make him tenant; *Berry v. Greene* (d), *Rex v. Dame Jane St. John Mildmay* (e). Next, the defendant contends that

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(a) 2 Str. 1142.

(b) 10 East, 273.

(c) 12 Q. B. 739.

(d) Cro. Eliz. 349.

(e) 5 B. & Ad. 254.

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stat. 3 & 4 W. 4. c. 27. is inapplicable to mines; for that the mine, as distinct from the rest of the land, is not a corporeal hereditament. *Wilkinson v. Proud* (a) is a decision to the contrary: though a mere right to take coal in the land of another is incorporeal, and may be claimed by prescription, a mine lies in livery. [Lord Campbell C. J. What do you say to the case of an unopened mine?] Livery may be made symbolically: but mines are generally accessible in fact; *Bainbridge on Mines*, 97. In *M'Donnell v. M'Kinty* (b) it was held that, where the owner of land conveyed it in fee, with an express exception of mines, his right to the mines was not barred by his not working them for twenty years. But here the defendant, and those through whom he claims, have never been in possession of the mine as distinct from the surface. His right therefore runs from the lease of 1821, and is extinguished, the statute destroying the right and not simply barring the remedy.

Secondly, as to the issue on the plea that the closes are not the plaintiff's. The defendant, on this issue, must make out his actual possession under the lease at the time of the trespass; for, *prima facie*, the plaintiff, being tenant of the land, is in possession of the mine. The question therefore upon this plea is substantially involved in that on the other.

Watson and Sir *T. Phillips*, *contra*. First, the defendant is entitled to the verdict on the issue on the second plea. The plaintiff has never had possession of the mine. *Branthwaite*, when tenant from year

(a) 11 M. & W. 33.

(b) 10 Irish Law Rep. 511.

to year, and before the lease for ninety nine years, was legally in possession of the whole, surface and mine. The different interests of owners of the mine and of the surfaces, where there has been a severance, were much discussed in *Humphries v. Brogden* (a). In such case, if an injury be done to the mine, the remedy for the owner of the mine is by an action of trespass, not an action on the case for injury to the reversion. But, where there has been no such severance, the tenant of the surface is tenant of the mine: he is the legal possessor, though he commits waste if he work the mine; *Saunders's Case* (b). [Lord Campbell C. J. It is like the case of timber.] The law is clearly shewn, in the case of copyhold land, by *Bourne v. Taylor* (c) and *Lewis v. Branthwaite* (d); and, in the case of land in general, by *Raine v. Alderson* (e). Then, *Branthwaite* being in possession of all, a lease of the mines for ninety nine years was granted to him and *Prothero*. *Branthwaite* could not enter, because he was already in possession: he is therefore possessed of the mines for the ninety nine years. Where entry cannot be, possession vests without any act done; *Browning v. Beston* (g), *Digges's Case* (h), *Littleton*, sect. 460. The possession enures to the title; *Taylor dem. Athyns v. Horde* (i). [Coleridge J. Do you say that at that time the copyhold tenant in fee could not have granted a lease of the mines to a third person?] He could not have granted such a lease in possession without the concurrence of *Branthwaite*. Then the possession of *Branthwaite*, one joint tenant, enures to both joint

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(a) 12 Q. B. 739.

(c) 10 East, 189.

(e) 4 New Ca. 702.

(h) 1 Rep. 173 a. 174 a.

(b) 5 Rep. 12 a.

(d) 2 B. & Ad. 437.

(g) Plowd. 131. 133.

(i) 1 Burr. 60. 90.

1853. tenants; *Smales v. Dale* (a). The two could not, for instance, have brought ejectment in 1825 against *Lewis*. It is therefore unnecessary to inquire whether this lease could operate under the statute of uses; though the objection that it cannot is not one which the lessor is entitled to make, since the lord only can be prejudiced. Then, in 1832 the tenancy from year to year ceases, and the possession of the surface reverts to *Lewis*: but the possession of the mines is not affected thereby. The consequence is that the mines are severed, and remain in the possession of the termors for the ninety nine years. It is not disputed, on the part of the defendant, that mines, when severed by distinct exception or grant from the rest of the land, lie in livery and are part of the inheritance: perhaps, as *Alderson B.* suggested in *Wilkinson v. Proud* (b), there might be a symbolical livery of seisin. On the other hand, *Mr. Preston*, in his remarks upon *Shep. Touchs.* 96 (c), suggests that an opened mine lies in livery, but an unopened mine in grant. But here the grant of the mine to a person already in possession (by having possession of the surface) gives as complete possession of the mine as a release of land does to a party in possession under the statute of uses by bargain and sale for a year. So, if trees be excepted from a lease of land, they will pass by grant of the reversion; *Liford's Case* (d).

Next, as to the issue on the third plea. The defendant was not barred, he and those through whom he claims not being out of possession for twenty years, nor at all. [*Wightman J.* When do you say the defendant's right of entry accrued?] It never was reduced to a mere right of entry: there has been uniform posses-

(a) *Hob.* 120 (5th ed.).

(c) 7th edition.

(b) 11 *M. & W.* 36.

(d) 11 *Rep.* 46 b. 50 a.

sion. Stat. 3 & 4 W. 4. c. 27. s. 2. refers only to the right to enter into that which is in the possession of another. [*Wightman J.* Your argument then comes to this, that the statute does not apply at all. But you have pleaded as though it did.] The plea confesses the possession in the plaintiff, but claims right of entry: and the replication asserts that this right first accrued more than twenty years upon the entry. [*Wightman J.* And then you assert that it first accrued within the twenty years: when was that first accruing?] *Erle J.* I suppose you say it accrued at the time of the entry, eo instanti.] Yes: the possession of the plaintiff at that time is confessed: and the defendant is shewn to have a right to enter upon that possession, by virtue of his own uninterrupted possession up to the time at which the plaintiff's possession is, by the confession, admitted to exist. The replication admits the facts upon which the defendant insists, down to and including the assignment of the lease to the defendant. [*Erle J.* According to the old mode of pleading, you would have given express colour to the plaintiff.] This view relieves the case from the difficulties which have sometimes been suggested as to the application of statutes of limitations to mines, opened or unopened, as well as to tithes; *Hodgkinson v. Fletcher* (a), *Dean and Chapter of Ely v. Cash* (b). *M'Donnell v. M'Kinty* (c) has not been distinguished from the present case: the question there was whether the right to a mine, severed from the land, which had not been worked for twenty years, was barred; and it was held not to be barred.

Cur. adv. vult.

(a) 3 Doug. 31.

(b) 15 M. & W. 617. See *Dean of Ely v. Bliss*, 2 De G. M'N. & G. 459.

(c) 10 Irish Law Rep. 514.

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Lord CAMPBELL C. J. now delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows.

It seems to us that the defendant is entitled to have the verdict entered for him on the plea of Not possessed. We think that, at the time when the alleged trespasses were committed, the defendant must be considered as having been in possession of the minerals demised to *Branthwaite* and *Prothero* by the lease of 8th *March* 1821.

To arrive at this conclusion, it is not necessary to consider the operation of the Statute of Uses upon such a lease, or to enter into various other subtleties which were presented to us in the course of the argument on both sides. The foundation of our opinion is, that, at the time when the lease was executed and the term granted by it commenced, *Branthwaite*, one of the lessees, was tenant of the farm under which the minerals demised lie. Being in possession of the surface, in point of law he was in possession of the minerals. He had no right to *work* the minerals. If he had done so, it would have been waste; but the lessor could not have sued him in trespass; and, if strangers had worked the minerals even without breaking the surface, *Branthwaite* might have maintained trespass against them. The surface and the minerals may be dissevered in title, and become separate tenements, as appears abundantly from the cases cited; *Curtis v. Daniel* (a) and *Humphries v. Brogden* (b). But the *presumption* is to the contrary: and here there is nothing to rebut the presumption, down to the time when the lease of the minerals was granted. When *Branthwaite* became tenant of the surface, the minerals belonged to the

(a) 10 *East*, 273.(b) 12 *Q. B.* 739.

lessor; and they cannot be considered as excepted from the demise any more than timber trees. This doctrine never has been questioned, unless with regard to minerals under a copyhold tenement, as between the tenant and the lord. And in *Lewis v. Branthwaite* (a) it was held that, although the property in the minerals be in the lord, the possession of them is in the tenant, and that the tenant may maintain trespass against the owner of an adjoining colliery for breaking and entering the subsoil and taking the minerals. Lord *Tenterden* there says: "The general rule being that he who has the surface has the subsoil, it seems to me that the copyholder has possession of the subsoil, though he may have no property in it." *Littledale J.* adds: "It is not disputed that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth; but it is said that there is a distinction in this respect between a copyholder who is the tenant at will of the lord and a tenant of a freeholder." "It seems to me that the possession of the soil is in the copyholder from the surface down to the centre of the earth." *Patteson J.* fully concurs, saying: "There is no distinction between a tenant holding under a freeholder, and a copyholder holding at the will of the lord, according to the custom of the manor, as far as possession of the property is concerned. Although the copyholder may have no right to make use of the minerals, he has a sufficient possession to maintain trespass against a wrong doer."

Branthwaite thus having been in possession of the minerals as tenant from year to year when the lease of

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them to him and *Prothero* for ninety nine years was granted, is it to be said that this lease ousted him and revested the possession in the lessor? *Branthwaite* must be considered as continuing in possession, his estate being enlarged by the lease. Being already in possession, there could be no necessity for any entry to put him in possession under the lease; and we have not been told how he could have entered upon himself. When the lease was executed, he was then in a situation to have taken a release in fee of the minerals, or any intermediate interest between the fee simple and a tenancy from year to year: a lease for ninety nine years must for this purpose operate in the same manner as a release for that term. Had *Branthwaite* been the sole lessee of the minerals, the point does not appear to admit of any doubt. Does it make any difference, for this purpose, that the lease was to him and another? Must not his possession under the lease be construed the possession of himself and his colessee? *Branthwaite* being lawfully in possession under the lease, his possession enures for the benefit of both; and the interest passing by the lease cannot be considered a mere *interesse termini*. The lessor could not have entered upon *Branthwaite*, as far as the minerals are concerned; and neither the lessor nor any claiming the reversion under him can be considered as having been in possession at any time since the lease was executed. There was a privity between the two lessees sufficient to make the possession of the one the possession of both; and under the circumstances there was no act to be done by *Prothero* to convert the *interesse termini* into a vested interest in possession.

For these reasons, the defendant, who has in him all

the interest of the two lessees, must be considered, in so far as regards the plea we are now considering, as lawfully in possession when he committed the alleged trespasses in working the mine.

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If *Branthwaite* and *Prothero* are to be considered as having been once lawfully in possession under the lease, it further appears to us that the defendant is entitled to a verdict upon the issue arising out of the replication of the Statute of limitations to the special justification. This plea, confessing and avoiding, admits that the plaintiff was de facto in possession when the defendant entered to commit the trespasses, and is founded upon a right in the defendant to enter and take the coals as assignee of the lease. The plaintiff replies that the right of entry relied upon did not first accrue to the defendant or those under whom he claims within twenty years.

If the defendant is confined to a right of entry under the lease, supposing that till the entry to commit the trespasses complained of there never had been any entry, and that the lease till then continued only an *interesse termini*, the issue must be found for the plaintiff; for more than twenty years had elapsed since the granting of the lease and the first accruing of the right to enter under it. But we think that the defendant was at liberty to set up any right of entry which was vested in him, possession once having been taken under the lease, and that he is not driven to rely on a right of entry when the lease is supposed only to have given an *interesse termini*. If this be so, the evidence at the trial shewed a possession of the minerals by *Branthwaite* and *Prothero* under the lease by reason of *Branthwaite's* tenancy of the superincumbent surface; and the pos-

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session under the lease may be supposed to have continued till they were dispossessed within twenty years before the time when the defendant entered to commit the alleged trespasses. Upon this ouster, a new right of entry would accrue; and this may well be the right of entry on which the defendant relies in his special justification. But this right of entry first accrued within twenty years.

Therefore on both issues there ought to be

Judgment for the defendant.

Mr Locks & Co
(BNS) 812

The following case is inserted here on account of its connection with the case which immediately succeeds it.

[*Thursday,*
June 3d, 1852.]

The Trustees of The BIRKENHEAD DOCKS, Appellants, *against* The Overseers of the Poor of the Township of BIRKENHEAD.

The Trustees of *Birkenhead Docks* are empowered, by statute, to take lands by purchase, &c., to construct

works, to resell or lease land not wanted, to impose, within a certain amount, such rates for vessels using their dock as they may think proper, and to vary these rates, and to lease their wharfs, quays, &c. They are also empowered to borrow money on the security of the rates. *All* sums received from rates, or the sale or rents of land, are to be laid out by them in defraying the costs of the works, paying officers and servants, carrying the Act into execution, and paying the interest and principal of moneys borrowed.

Held: that they were rateable to the poor in respect of their premises:

For that, assuming that the purposes to which all the sums are appropriated by the statute are public, still it did not appear that the rates must be kept down so as only to meet such appropriation; and therefore it could not be considered that the Legislature had absolutely disposed of all the profits to purposes other than the poor rate, or that the poor-rate might not properly be paid before ascertaining the sum which would be wanted for such other purposes.

order of *Wightman J.* under stat. 12 & 13 *Vict. c. 45. s. 11.*, for the opinion of this Court: the Acts of Parliament, after mentioned, to form part of the case.

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The Township of *Birkenhead*, in the county of *Chester*, was placed under the management of public commissioners by the Act of Parliament, 3 & 4 *W. 4. c. lxviii.* (local and personal, public). In 1844, an Act, 7 & 8 *Vict. c. lxxix.* (local and personal, public), was passed, intituled "an Act for constructing tidal basins, a dock, and other works at *Birkenhead* in the county of *Chester*; and for other purposes." And it was thereby enacted (a) that the Commissioners constituted under stat. 3 & 4 *W. 4.* above referred to should be the Commissioners for carrying that Act into execution, and should be called "The Commissioners of *The Birkenhead Docks*," and (b) should have authority

(a) Section 1.

(b) Sect. 39.

By sects. 55, 56, the Commissioners of Woods and Forests were empowered to make grants, or sales or leases, of Crown lands to the Dock Commissioners; and, by the 57th and following sections, the Commissioners last mentioned have power to purchase lands.

Sect. 124 gives them power to resell, or demise for terms of years, land not wanted.

Sect. 125 gives them power to construct basins, docks, quays, wharfs and other works.

Sect. 163 enacts: "That it shall be lawful for the Commissioners to demand and receive for every vessel which shall enter any of the basins or docks to be constructed under the authority of this Act any sum not exceeding the several rates following;" &c.

Sect. 191 empowers the Commissioners to lease or grant the use or occupation of quays, wharfs, &c.

Sect. 225 enacts: "That it shall be lawful for the Commissioners to fix and determine the tolls to be taken by virtue of this Act, but so nevertheless as not to exceed the respective sums herein before authorized to be received; and it shall also be lawful for the Commissioners from time to time to lower, reduce, or alter all or any of the said tolls, and again to raise the same to

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to borrow on the credit of the rates and tolls by that Act granted, and of any property vested in the said Commissioners by virtue of that Act, a sum not exceeding 400,000*l.*; and, as a security, the Commissioners might assign over the said rates, tolls and property, or any part thereof, to the person advancing or lending the same, by way of mortgage, in the manner and form therein directed and provided, and subject and according to the provisions, and the true intent and meaning, of the Act in that behalf.

By an Act, 8 & 9 *Vict. c. iv.* (local and personal, public), additional powers were given to the Commissioners, enabling them to borrow a further sum of money not exceeding 600,000*l.*, on mortgage as aforesaid, and to make a floating dock within *Wallasey Pool*.

By two other Acts, 10 & 11 *Vict. cc. cclxiv., cclxv.*, both local and personal, public) additional powers were conferred upon the Commissioners in reference to the *Birkenhead Docks*.

such amount as they shall think proper, not exceeding the respective sums by this Act authorized to be received."

Sect. 227 enacts: "That all sums of money which shall be received by the Commissioners from the rates and tolls granted by this Act, and all sums arising from the sale of any lands, or the rents thereof, shall be applied by the Commissioners in defraying the costs, charges, and expences of keeping in repair and from time to time deepening, cleansing, improving, and maintaining the sea wall, basins, dock, embankment, roads, cuts, drains, culverts, and other works which may be erected or made under the authority hereof, and of paying the officers and servants employed by the Commissioners in and about and concerning the same, and of otherwise carrying this Act into execution, and for paying the interest and repaying the principal of any sum of money which shall be borrowed by the Commissioners under this Act, under such regulations and conditions as the Commissioners may from time to time think reasonable."

By another Act, of 11 & 12 *Vict. c. cxliv.* (local and personal public), entitled "An Act to alter and amend the several Acts relating to the *Birkenhead* Commissioners' Docks, and to transfer the several powers of the said Commissioners to a corporate body to be entitled 'The Trustees of The *Birkenhead* Docks;' and for other purposes," the several rights, duties, powers, authorities, privileges and immunities conferred upon the said Commissioners by the former Acts, for carrying into execution the several purposes and provisions of the said former Acts and that Act, were vested in certain persons thereby incorporated by the name of 'The Trustees of The *Birkenhead* Docks' (a).

In pursuance of the powers given to them by the said Acts of Parliament, the said Commissioners and Trustees have accordingly borrowed the sum of 450,000*l.* upon mortgage as aforesaid, and have erected and built two docks, called *The Morpeth Dock* and *The Egerton Dock*; which are now completed, and used by shipping frequenting or arriving in the river *Mersey*. And they are now in progress of erecting a great float and other outer works, which are not yet completed. Among other works erected on the land vested by the said Acts in the said 'Trustees, and completed, are certain offices, workshops and premises, erected and built by the said Commissioners and Trustees on land so vested in them, which is in the township of *Birkenhead* in the county of *Chester*: which offices, workshops and premises are now,

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(a) Sections 1, 3, 4. By sect. 1 the creditors, from whom the money had been borrowed under the previous Acts, are "hereinafter called 'bondholders.'" By sect. 16 the word "bondholder" is to include every person holding mortgage, bond, or other security under seal, granted by the Commissioners or Trustees under any of the Acts.

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and were at the time of the making of the poor rate herein after mentioned and now in question, in the actual and exclusive occupation of the said Trustees under the authorities, and solely for the purposes, of the said Acts of Parliament. And the said offices, workshops and premises are hereby admitted, for the purposes of this case, to be of the annual value of 550*L*, and, if rateable to the poor, to be of the rateable value of 500*L*, as stated in the extract from the rate herein after mentioned.

The Overseers of the Township of *Birkenhead* have assessed a portion of the said *Birkenhead* Dock Estate, namely the said offices, workshops and premises, to the relief of the poor.

The rate was, on 28th *April* 1851, duly made, allowed and published: in which the Dock trustees were assessed as follows.

	Estimated Rental.	Rateable value.	Rate at 6 <i>d</i> .		
" <i>Lionel Goldsmid, William Bailey, Junior, and others the Trustees of The Birkenhead Docks</i> "	£ 550	£ 500	£	s.	d.
" Offices, workshops and premises."			12	10	0

And against this rate the Trustees now appeal.

The appellants object that the said offices, workshops and premises are not liable to be rated to the relief of the poor, because they say that they have no other right, title or interest in the said offices, workshops and premises, except as such Trustees of the said *Birkenhead* Docks under and by virtue of the provisions of the said several Acts of Parliament hereinbefore mentioned: and that they occupy the said offices, workshops and premises, as such Trustees, solely for the purpose of carrying into execution the works, and doing the business, which they are authorized and appointed to execute and

do, according to the provisions of such acts, as such Trustees as aforesaid. And that they, the appellants, do not, nor does any other person, derive any personal benefit whatever from such occupation. That, by virtue of the said Acts of Parliament, they, as Trustees as aforesaid, are authorized to borrow certain sums of money, and receive certain rates, which sums of money and which rates are, by the said Acts, applicable solely to the public purposes therein specified. That they, as such Trustees, manage the Dock Estate by their servants and agents, who receive and account to them for all such sums of money and rates so borrowed and received as aforesaid. That all moneys and funds whatsoever, collected, received, levied, borrowed and raised by virtue of the said several Acts, are and have been, by the said Trustees, applied in the manner and for the purposes directed by and specified in the said several Acts, in accordance with the provisions thereof, and for no other purpose and in no other manner whatever. That they, as Trustees as aforesaid, derive, under the said Acts, no private advantage from the execution of their trust. And that there is no surplus or profit accruing to the said appellants from the said estate, as such Trustees, after the application by them of the moneys arising from such estate in the manner directed by the said several Acts of Parliament hereinbefore mentioned.

If the Court shall be of opinion, upon the said objection, that the said offices, workshops and premises are not liable to be rated to the relief of the poor, and therefore that the said rate should be amended by striking out the said assessment, then judgment, in conformity with the decision of such Court, and for such costs as such Court shall adjudge, may be entered, on motion by

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the appellants at the Quarter Sessions for the said county next, or next but one, after such decision shall have been given. But, if the Court shall be of opinion that the said Trustees are liable to be rated for the offices, workshops and premises in the said rate mentioned, and that the said rate should therefore be confirmed, judgment in conformity with the decision of such Court, and for such costs as the said Court shall adjudge, may be entered on motion by the respondents at the Quarter Sessions for the said county next, or next but one, after such decision shall have been given.

The case was argued in *Easter* term, 1852 (a).

Archbold, for the respondents. The appellants are properly rated. They are the parties in possession. [Lord Campbell C. J. They are *primâ facie* rateable: we had better hear what is to be urged against the rate. *Pashley*, for the appellants, stated that he relied on *Rex v. Liverpool* (b).] The trustees of the *Liverpool* docks were there held not to be ratesable, because the rates and duties were to be applied to paying off the debt incurred in making the dock, and to repairs of the Dock: and the rates were to be lowered so as to produce only a sum sufficient for those purposes. There was thus no possibility of profit. Here no such provision is made by the statutes. By stat. 7 & 8 *Vict. c. lxxix. ss. 55., 56., 57.*, the Commissioners are empowered to obtain land in various ways: by sect. 125 they may construct works: by sect. 191 they may lease them: by sect. 153 they may take rates for the use of the dock:

(a) May 1st. Before Lord Campbell C. J., *Wightman*, *Erle* and *Crompton* Js.

(b) 7 B. & C. 61.

all these sources of income may produce a surplus. [1852.] *Pashley* referred to sect. 227.] That clause requires the application of all the sums raised to the purposes of the Act, and to the payment of the debt: but there is nothing to prevent a surplus arising, after such application. Stat. 11 & 12 *Vict. c. cxliv.* substitutes the Trustees for the Commissioners. The Trustees are thus in actual occupation in trust for the bondholders to whom the rates are mortgaged, and who thus, through the Trustees, have a beneficial occupation. [*Erle J.* In *Rex v. Liverpool* (a) the duties were primarily liable to the debt.] The creditors there were not occupiers.

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Pashley, contra. The Act does not give the bondholders any occupation: the Trustees hold for the general purposes of the Act, not for the bondholders in particular. [*Crompton J.* The corporation, as such, are not bondholders.] The case cannot be distinguished from *Rex v. Liverpool* (a). Sect. 227 directs the application of "all sums of money," which the Commissioners can receive, to the public purposes: there can therefore be legally no surplus, any more than there could in *Rex v. Liverpool* (a). The Trustees are in the position of overseers, who cannot in contemplation of law have a surplus, because they may not raise more than is wanted for parochial purposes. *Regina v. The Mayor &c. of Liverpool* (b) is in point. [*Crompton J.* There the question was not as to the existence of a surplus: but sect. 92 of stat. 5 & 6 *W. 4. c. 76.* appropriated all the corporate funds, of which the rates made a part, to

(a) 7 B. & C. 61.

(b) 9 A. & E. 435.

[1852.] municipal purposes.] In *Regina v. Badcock* (a) the Trustees were held rateable, because the purposes to which the profits were applicable were not strictly public: but the principle for which the appellants now contend was affirmed.

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Archbold, in reply, The exemption from rate, on the ground of the proceeds being applicable to public purposes, is much restricted by the decision in *Regina v. Wallingford Union* (b). Sect. 227 of stat. 7 & 8 Vict. c. clxxix. contains nothing to prevent the Trustees, should a surplus in fact arise, from applying it to other than public purposes. That being so, the property is subject to poor rate: and the parties to be rated are the Trustees; *Rex v. St. Giles, York* (c).

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that the rate in question is valid.

The appellants are *primâ facie* liable to it, under stat. 43 *EL. c. 2. s. 1.*, which enacts that every occupier of lands and houses shall be rated to the relief of the poor. They are seised in fee, and are actually in possession of the *Birkenhead Docks*, from which they receive a large revenue. Their exemption from rateability would operate as a great hardship upon the rate payers within the township. This property, before it was applied to the construction of docks, was rateable and rated to the relief of the poor; and, from its being applied to this

(a) 6 Q. B. 787.

(b) 10 A. & E. 259.

(c) 3 B. & Ad. 573.

great commercial speculation, the number of destitute persons within the township must be considerably increased. Still, we are only to consider what the law upon the subject is: and we are bound to pronounce in favour of the exemption, if it has been conferred by any subsequent statute.

The appellants do not, and could not, rely upon the mere circumstance of their being trustees, and so not entitled to any personal advantage from the property vested in them. They contend that the dues to which they are entitled are all appropriated to public purposes, and that therefore they are exempt from rateability, according to the decision of this Court in *Rex v. Liverpool (a)*.

Where no one can be found who may be considered the occupier of lands and houses, the statute of *Elizabeth* does not extend to them: but, where there are occupiers of lands and houses within the meaning of that statute, the exemption must rest on some subsequent enactment of the Legislature. We apprehend that this doctrine was admitted and acted upon in *Rex v. The Commissioners of Salter's Load Sluice (b)*, from the marginal note of which the exemption on the ground of public purposes takes its origin. The question argued at the bar, and to be considered as decided, was, whether the Legislature, by the local act, intended impliedly to exempt the tolls from rateability, although Lord *Kenyon*, in delivering the judgment of the Court, uses some expressions about there being no occupier because the Commissioners were merely trustees. The decision can be rested only on the clause in the local act which

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(b) 4 T. R. 730.

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directed the tolls "to be applied and disposed of for the several uses and purposes of the said act, and to no other use or purpose whatsoever." The question was, Whether this amounted to a prohibition to apply the tolls to the payment of poor's rate? The Court adopted this construction, instead of holding the meaning of the words to be, that the clear produce of the tolls, after deducting the expence of collecting them and all the charges to which the property was liable (such as poor's rates), was to be applied to these purposes.

We think that the decision in the *Liverpool* case (a) can only be supported by similar reasoning. There the local acts directed that the rates and dues received for the use of the dock should be applied to paying off the debt incurred in making it, and to keeping it in repair, and that, these purposes being effected, *the rates should be lowered* for the benefit of those using the dock. Lord *Tenterden* would not adopt the construction of the statutes, that the charges ought to be deducted from the rates before they were so applied: but still he proceeded upon a special statutable exemption, saying: "The statute under which the dock rates in question are levied does not indeed contain an express direction that the rates shall be applied to the purposes specified, and no other; but it directs that certain burdens shall be discharged, and that *then the rates shall be lowered*; and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute." It follows that, if we recognise this case, we must look to see whether, by the local acts respecting the *Birkenhead* Docks, the Legislature has conferred the exemption claimed.

(a) *Rex v. Liverpool*, 7 B. & C. 61.

By stat. 7 & 8 *Vict. c. lxxix. s. 153.*, the Commissioners who occupy the property are empowered to levy certain rates from vessels; and, by sect. 225, to lower, to alter, or again to raise them, at their discretion, provided they do not exceed the specified amount. And, by sect. 227, all sums received from rates, or from sale of land, or from the rent thereof, are to be applied to the costs and expences of keeping the docks in repair, and of paying the officers and servants employed in them by the Commissioners, and of otherwise carrying the act into execution, and for paying the interest and repaying the principal of any sum of money which shall be borrowed by the Commissioners, under such regulations and conditions as the Commissioners may from time to time think reasonable. We are of opinion that these enactments are not sufficient to testify any intention of the Legislature to exempt the *Birkenhead Docks* from liability to contribute to the relief of the poor. Assuming all the purposes enumerated in sect. 227 to be public purposes (about which there may be considerable difficulty), here the obligation to lower the tolls, so much relied upon in the *Liverpool* case, is entirely wanting: there is nothing amounting to a prohibition against payment of other charges than those specified: and we can find nothing to shew that the Commissioners may not pay poor's rates, along with other charges, before the net amount of the fund is ascertained which may be applied to the purposes of the Act. There is no statement, and there has been no suggestion, that the rates, at the scale to which they may be lawfully raised, would not, after payment of this charge, be sufficient for all these purposes.

We, therefore, consider that the present case is dis-

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tinguishable from those relied upon, and that the property of the appellants, not being expressly or impliedly exempted by the Legislature, ought to bear its share of the public burdens with other lands and houses in the township.

It is thus unnecessary to examine whether the case of *Rex v. Liverpool* (a) be affected by *Regina v. Badcock* (b), *Regina v. Longwood* (c) and *Regina v. Harrogate Commissioners* (d), or any other subsequent decision.

We have now only to give

Judgment for the respondents (e).

(a) 7 B. & C. 61.

(b) 6 Q. B. 787.

(c) 13 Q. B. 116.

(d) 15 Q. B. 1012.

(e) On the same day, *Archbold* applied for costs, according to the terms on which the case was reserved; but the Court declined to make the order, saying that the case was one of importance and nicety.

Saturday,
 May 7th.

The QUEEN against The Reverend FREDERICK TEMPLE.

Lands were
 purchased by
 the Lords
 Commissioners
 of Her Ma-
 jesty's Treas-
 ury, on behalf
 of the Lords
 of the Com-

ON appeal against a rate and assessment made for the relief of the poor of the parish of *Twickenham*, in the county of *Middlesex*, in 1850, whereby the Reverend *Frederick Temple* was assessed, as the occupier of the premises, for the purpose of establishing a normal and model school, and were conveyed to a trustee for them. The premises were occupied as a normal school. A Principal and masters were appointed, who resided on the premises. Part of the lands were let; and the proceeds, together with annual payments from the scholars, were carried to the general funds of the school, but were not sufficient to defray the expences; and the deficiency was made good by the Committee of Council out of the money voted by Parliament for the promotion of public education.

Held: that the premises were liable to the poor rate, as there was a beneficial occupation; and that, though the premises were occupied for a public purpose, and the expences were defrayed out of the public revenue, those circumstances did not afford a ground of exemption.

of *Kneller Hall* and grounds, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

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Kneller Hall and the premises, in respect of which the said *Frederick Temple* is rated and assessed as occupier, having been previously rated to the poor rates, were, in the year 1847, purchased by the Lords Commissioners of Her Majesty's Treasury on behalf of the Lords of the Committee of Council on Education, for the purpose of establishing a normal and model school for the training of masters of schools for pauper and criminal children, and conveyed to *J. P. Kaye Shuttleworth Esq.*, by whom a declaration of trusts was executed (a copy of which was annexed to the case). As soon as the purchase was completed the premises were, by the direction of the said Lords of the Committee of Council on Education, fitted up for the purpose proposed, the costs of which were wholly defrayed by the said Commissioners. The premises consist of a residence for the Principal, apartments for a Vice Principal, and two Masters, common rooms, lecture rooms, and sleeping rooms for ninety one students, with kitchens and servants' offices. The land, as well as the buildings thereon, were purchased wholly and exclusively for the use of the school, it being part of the plan to qualify the students to act as instructors in spade husbandry and cattle feeding: but, until such time as a sufficient number of students to cultivate the whole of the land shall have entered the institution, the pasturage of a portion of the land is let, and the proceeds carried towards the expences of the establishment. About *Christmas* 1849, the appellant was appointed Principal of the establishment by Her Majesty the Queen in Council, and a Vice Principal

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and two masters were appointed under him. The Principal, Vice Principal and masters are engaged, and paid certain fixed salaries, by the said Committee of Council on Education ; and they hold office during the pleasure of the Crown. In addition to their salaries, they are each of them entitled to have meals at the common table, and are provided with apartments in the establishment ; and the Principal has the privilege of supplying himself with fruit and vegetables from the garden. The appellant is required to reside night and day upon the premises. The rooms occupied by him, as Principal, are: on the basement, a servants' hall, cellars, kitchen and scullery ; on the ground floor, an entrance hall, library and dining room ; on the first floor, a drawing room and one bed room ; on the second floor, one bed room, with two smaller rooms also for beds ; and three attics over the large bed room, in an upper story. The Vice Principal and each of the masters has only a sitting room and bed room. The pupils are admitted by the said Committee of Council on Education ; and all the expences of the said establishment are defrayed by the said Committee out of the money voted by Parliament for the promotion of public education. On the opening of the institution, in *January* 1850, the following regulations, amongst others, were adopted by the said Committee of Council on Education.

Admission of students.—The payment to be made by the students will be 30*l.* per annum, to be paid half yearly in advance, with the exception of those who obtain the highest exhibitions hereinafter mentioned. Candidates will not be admitted unless they can shew reasonable grounds for believing they will be enabled to meet these payments as they become due. Candidates must be at

least seventeen years of age, and free from any bodily infirmity tending to impair their usefulness as school-masters.

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Exhibitions.—It appeared to their Lordships that it was desirable to encourage deserving students to enter the institution, who yet might be unable from their own or their friends' resources to provide entirely for the requisite payments. Candidates for exhibitions will be examined on the subjects prescribed for the third or lowest degree of certificates of merit. No candidate will receive an exhibition who fails to shew on examination an amount of attainments equal to that required of pupil teachers at the close of their apprenticeship. To the five best candidates, not falling below the lowest standard required for a certificate of merit, will be granted exhibitions of 30*l*., for one year. But popular astronomy, mechanics, mensuration, land surveying and levelling, which are amongst the subjects required for the third degree of merit, are not to be regarded as indispensable to their success in their examination, provided the candidate shews himself well acquainted with the others, especially with the three first books of *Euclid*. To the six candidates next in order of merit will be granted exhibitions of 25*l*., for one year. To the ten candidates next after these will be granted exhibitions of 20*l*., each for one year.

Certificates of Merit.—It appeared to their Lordships that it was very probable that the students who obtained money to pay for their admissions by means of one of the above named exhibitions might be quite unable at the end of the year to raise the 30*l* necessary to enable them to remain in the institution another year. It appeared also very undesirable that these students (who may

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be expected to be superior to the rest in attainments) should be obliged to leave the institution at the close of only one year's study. It was therefore resolved that, at the close of each year, the students should be examined at the same time as those of the other training schools under inspection; and that the grants made to training schools on account of successful students, in accordance with the minute of 21st *December* 1846, be extended also to *Kneller Hall*, and be deducted from the payments to be required of the students on whose account they are made.

The whole amount that has been received on this account, since the opening of the establishment in 1850, does not exceed 130*£*; the money so received from the different students is applied to the general expences, and in reduction of the outgoings of the establishment, although the sum of 30*£* is not sufficient to defray the yearly cost of the board and maintenance of each student. The Principal renders a quarterly account of all receipts and disbursements on account of the school, to the Lords of the Committee of Council on Education (in which he debits himself, *inter alia*, with the money received from and on account of the students, and the pasturage of the land, and credits himself, *inter alia*, with the sums paid for the manure, seed &c. for the garden), by whom those accounts are to be audited and controlled. The object of the establishment is to perfectly train and prepare the students to act in the education of youth; and, as they become qualified, they are to be recommended by the Lords of the Council aforesaid to fill the situations of schoolmasters either in prisons, workhouses, or other establishments for the gratuitous education of the poor. There is also a school

held in one of the rooms of the establishment for the purpose of affording practice to the students in elementary instruction; the school is attended by the poor children of the neighbourhood. These children are required to pay to the appellant a sum weekly for their education, and are allowed to purchase books from the appellant. The funds derived from the school are entirely spent, and are intended to be entirely spent, upon its maintenance and improvement, and are not carried to the general funds of the training establishment. The Court of Quarter Sessions further find that the house, so as above allotted to the use of the Principal, is not more than is sufficient for the residence of a person in his station of life as the head of this establishment with his family; but that the same is more than sufficient for the mere discharge of his individual duties: and they find that he has a beneficial occupation of such portion of the house as is not required for the discharge of such duties; viz. of all but the library and the best bed chamber; unless the Court of Queen's Bench shall be of opinion that, as he is required by the nature of his office to reside on the premises by night and by day, a sufficient provision for the accommodation of his family ought, within the meaning of the decided cases, to be considered as a non-beneficial occupation.

The question for the opinion of this Court is, whether the premises are liable to be assessed to the relief of the poor. If the Court should be of opinion that they are not liable to be assessed, the order of Sessions is to be quashed. If the Court should be of opinion that the premises, or any part thereof, are liable to be so assessed, the case is to be sent back to the Sessions, and the rate

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to be adjusted accordingly : it being conceded that, if the premises or any part is rateable, the appellant is to be considered the occupier for that purpose.

The declaration of trusts, of which a copy was attached to the case, was made between *James Phillips Kay Shuttleworth*, of *Downing Street*, Esquire, Secretary to the Committee of Council on Education, of the first part, and *Charles Edward Trevelyan*, of the *Treasury Chambers, Whitehall*, in the county of *Middlesex*, Esquire, of the second part. After reciting that *J. P. K. Shuttleworth* purchased the said hereditaments and premises, not with his own money or on his account, but with the money of the said Lords Commissioners of Her Majesty's Treasury, and on behalf of the Lords of her Majesty's Council on Education, and for the purposes of public education, as he the said *J. P. K. Shuttleworth* thereby acknowledged ; and that it had been deemed advisable that that declaration of trusts should be executed by him : it was declared that *J. P. K. S.* held the premises "upon trust to permit and suffer the said several premises and hereditaments, and the profits thereof, to be applied to such uses and purposes as the Lords of the Committee of Council on Education, or one of Her Majesty's Principal Secretaries of State in their default, shall from time to time direct and appoint ; and to convey and assure the said hereditaments and premises, or any part thereof, to such person or persons, and in such manner, as the said Lords of the Committee of Council, or the said Secretary of State, shall from time to time require ; and, further, that all money received on the sale or demises of all or any part of the said premises and hereditaments, or otherwise, shall be paid to the Lords Commissioners

of the Treasury for the time being, or in such manner as the said Lords of the Committee of Council, or the said Secretary of State, or the said Lords Commissioners for the time being, shall direct."

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The case was argued in this Term (a).

Montague Chambers and *Huddlestons*, in support of the rate. The grounds on which an exemption from poor rate is claimed seem to be, that the property is occupied for a charitable object, and also that it is public property. The class of cases of which *Rex v. Waldo* (b) is one proceed upon the supposition that, where the object for which the premises are occupied is entirely charitable, there is no beneficial occupier, but, where there is any beneficial occupation, though it be in furtherance of a charitable object, the premises are rateable; *Rex v. Catt* (c), *Rex v. Munday* (d), *Rex v. Agar* (e). The earlier cases on this subject are collected in 1 *Nolan's P. L.* (4th edition) 187, 188; and the principle there deduced from them is, that the distinction "as to where charities are rateable, and where they are not so, seems to depend on this,—whether there is anybody who can be rated as beneficial occupier." That is the principle laid down also in *Holford v. Copeland* (g), which was decided on the ground that the Masters in Chancery were not beneficial occupants of their chambers. Then comes the question, whether there is any beneficial occupation in this case. It is agreed in the case that no question shall arise as to whether Mr. Temple is the right person to be rated or not; so that it is not

(a) On 20th and 23d April, before Lord Campbell C. J., *Erie* and *Crompton* Js.

(b) *Cald.* 358.

(c) 6 *T. R.* 332.

(d) 1 *East*, 584.

(e) 14 *East*, 256.

(g) 3 *B. & P.* 129.

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(a) 3 *East*, 506.(c) 5 *A. & E.* 1.(e) 10 *Q. B.* 884.(b) 12 *A. & E.* 84.(d) 3 *B. & Ad.* 573.(g) 12 *A. & E.* 94.(h) 4 *T. R.* 730.

to be an exemption of property held for public purposes. Those cases were reviewed in *Birkenhead Dock Trustees v. Birkenhead Overseers (a)*.] There is no local Act in this case. The property does not belong to the Crown: but, even if the premises were the property of the Crown, they would be rateable if occupied beneficially by private persons; *Rex v. Terrott (b)*, *Regina v. Ponsonby (c)*, *Regina v. Shee (d)* was decided on the ground that Royal property is not rateable except in the hands of private occupiers. *Erle J.* so explains the case in *Regina v. Baptist Missionary Society (e)*. [Lord Campbell C. J. It is not questionable that the occupation is for the public benefit: and, as there is an annual appropriation Act, the Legislature must have sanctioned the application of the public money for the public benefit in this way. But it could hardly be the intention of the Legislature to throw any part of the burthen of these purposes, which are for the general benefit, exclusively on the rate payers of this parish.] There is another point: that, supposing the premises generally not to be rateable, the Principal is rateable for the accommodation in excess of what is necessary; *Rex v. Terrott (b)*.

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Bodkin and *Bullantine*, contra. It is impossible, after *Regina v. Sterry (g)* and *Regina v. Baptist Missionary Society (h)*, to contend that the premises are not rateable, because occupied for a benevolent object. But the case is within *Regina v. Shee (d)*: the persons who occupy do so only as servants of the Crown, and occupy

(a) Ante, p. 148.

(b) 3 East, 506.

(c) 3 Q. B. 14.

(d) 4 Q. B. 2.

(e) 10 Q. B. 893.

(g) 12 A. & E. 84.

(h) 10 Q. B. 884.

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only so far as is necessary for the purpose of the Crown.

In *Rex v. Terrott* (a) the distinction is taken between a person having the use of the subject of the rate for the mere exercise of public duty therein, and one who has a beneficial occupation. In that case it was found that Colonel *Terrott's* family resided on the premises, which was not at all essential for his public duty; and therefore he had a beneficial occupation. In the present case it is found that Mr. *Temple* must reside by night and by day. It therefore comes to be a question of fact, whether it can be seen that he has a beneficial occupation in excess of what is requisite. In other respects the case cannot be distinguished from *Regina v. Shee* (b). [Lord *Campbell* C. J. Were there any payments by pupils in that case?] There were not: but 5000*l.* a year was collected for admissions to the exhibitions; and there is no distinction in principle between the two modes of payment. The keeper there resided, occupied apartments, and received a salary, just as Mr. *Temple* does here. [Lord *Campbell* C. J. The rate was not on the keeper, but on the president.] No argument was raised on that in the case; nor did the decision turn on it. [Erle J. I was counsel in that case: and, according to my recollection, there was an arrangement that the question should be, not whether Sir *A. Shee* was the right person to be rated, but whether the premises were rateable (c).] Then, as to the supposed excess in the accommodation: it was merely a question for the Committee of Council on Education to say what accommodation was requisite. The governor of a gaol is not rateable though his family reside with him;

(a) 3 *East*, 506.

(b) 4 *Q. B.* 2.

(c) See 4 *Q. B.* 13, note (a).

Regina v. Shepherd (a), Justices of Bedfordshire v. St. Paul, Bedford (b).

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Lord CAMPBELL C. J. now delivered the judgment of the Court.

In this case we are called upon to say "Whether the premises are liable to be assessed to the relief of the poor?"

It was hardly contended, on the part of the appellant, that, if this "normal and model school for the training of masters of schools for pauper and criminal children" had been established and conducted by a society of public spirited individuals from their own funds, the rate would not have been lawful. In support of the rate, the decisions of this Court in *Regina v. Sterry (c)* and *Regina v. Baptist Missionary Society (d)* (of which we entirely approve) would have been decisive. We have here a house and land producing profit, and beneficially occupied. The institution is not of such a charitable nature as to bring it within the class of cases beginning with *Rex v. Waldo (e)*: and, although the purposes may be of a public and very laudable character, this consideration alone will not exempt corporeal hereditaments from liability to be assessed to the relief of the poor, even where the furtherance of education and religion is in view; for there is no power, as yet, conferred on an individual to compel the rate-payers of the parish in which he wishes to found such an institution to contribute to it against their inclination. It might

(a) 1 Q. B. 170.

(b) 7 Exch. 650.

(c) 12 A. & E. 84.

(d) 10 Q. B. 884.

(e) Cald. 358.

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have been well if the dedication of real property to purely *charitable purposes* had not exempted it from rateability, and if the trustees of the charity had taken it, subject to its former burdens, instead of the founder being munificent at the cost of others. This appears to have been considered as law in the time of Lord *Holt*, who says: "Hospital lands are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burthen upon their neighbours;" *Anonymous* (a) case in *Salkeld*. At present we think it must be taken as settled that a house or land applied to purely charitable purposes, in the common acceptation of that term, and occupied only by the objects of the charity, or in furtherance of the charitable purpose without profit being derived from it to any one, is exempted from rateability. But, if land and houses produce profit which is not entirely so applied, the occupiers are rateable, although they apply it to purposes beneficial to the public, unless the benefit is enjoyed by all who contribute to the poor's rate, and by them exclusively. Neither the statute of 43 *Eliz. c. 2.* nor any subsequent statute gives any exemption from rateability under such circumstances: and we can not confer upon a rate payer the power of increasing the contribution of his fellow rate-payers, and multiplying the probable number of paupers to be maintained by the parish, however disinterested and laudable his object may be in seeking to benefit the community.

The counsel for the appellant relied entirely on the

(a) 2 *Salk.* 527.

fact that this institution is established by the Government of the country : contending that *Regina v. Shee* (a) is an express authority to prove that on this ground the premises in question are entirely exempted from rateability. There may be some difficulty in reconciling this case with *Rex v. Terrott* (b) and *Regina v. Ponsonby* (c), when we consider the statement that, from the use of the Exhibition Rooms, the Royal Academy derived a revenue of 5000*l.* a year, part of which was employed in allowances to travelling students, in pensions to members of the Society who may be in want, and their widows, in an annual dinner to the members of the Academy and to persons in elevated situations of high rank, distinguished talents, or known patrons of the arts, who attend as guests on these occasions ; and that, after payment of the various expences above mentioned out of the receipts of the Society, there has been usually a surplus of variable amount, sometimes considerable, at other times small, which is applied towards the increase of the stock belonging to the Society invested in the names of trustees in trust for the general purposes of the institution. But, assuming this case to be well decided, we are of opinion that material differences are to be found between it and the case at bar. There considerable stress was laid upon the apartments rated being part of the hereditary domains of the Crown ; and it was said by Lord *Denman*, in delivering the judgment of the Court (d), “that the appellants may well be considered as the ministers or agents of the Crown for furthering objects for which property of the Crown is employed.” Great weight likewise appears to have been given to the

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(a) 4 Q. B. 2.

(b) 3 East, 506.

(c) 3 Q. B. 14.

(d) 4 Q. B. 17.

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manner in which King *George III.* founded the Royal Academy, and the honourable obligation supposed to be cast upon the Crown to make up any deficiency that might arise in its funds. "At the commencement of the Society," says Lord *Denman* (a), "the King supplied the deficiency in their funds out of the privy purse: and even now, if the profits from the annual exhibition should fail, and the sums which the providence of the Society has invested in the funds be expended, the Society must probably fall, unless sustained by the bounty of the Crown." None of these facts or observations are applicable to the "normal and model School" established in the parish of *Twickenham* on premises purchased by Mr. *Kaye Shuttleworth* "on the behalf of the Lords of Her Majesty's Council on Education, and for the purposes of public education" (the expence being defrayed by a vote of the House of Commons), "upon trust to permit and suffer the said several premises and hereditaments, and the profits thereof, to be applied to such uses and purposes as the Lords of the Committee of Council on Education, or one of Her Majesty's Principal Secretaries of State in their default, shall from time to time direct and appoint." Other and still more important differences present themselves as we proceed. The pasturage of a portion of the land is let, and the proceeds carried towards the expences of the establishment. If the whole property purchased had been let, there can be no doubt that the whole would have been rateable, although the rent might all be applied to the purposes of the institution. A sum of 30*L*. per annum is to be paid by the students; and candidates are not to be admitted unless they can shew reasonable grounds

(a) 4 Q. B. 17.

for believing that they will be able to meet the payments as they become due. A similar payment in *Regina v. Sterry (a)*, of 12*l*. per annum by or on behalf of each scholar, was considered sufficient to distinguish that case from those cases of occupation for charitable purposes which have been considered not rateable as not beneficial. "This sum," says Lord *Denman*, "it is true, is not adequate to the expence, and, in a popular sense, does not make the occupation of the premises beneficial, *i. e.* gainful: but still it is a revenue which the building produces; and actual gain on a balance of profit and loss is not needful; it is enough if a revenue be produced." Further, there is a school on the premises for elementary instruction, attended by children, who are required to pay to the appellant a weekly sum for their education, and who are allowed to purchase books from him.

We do not consider it necessary to advert particularly to the portion of the house occupied by the appellant and his family, as we have come to the conclusion that the premises generally are liable to be assessed to the relief of the poor. We can discover, for this purpose, no substantial difference between the "normal and model school" and any other educational establishment where cheap education is offered from the bounty of a founder. The funds which mainly contribute to the support of the establishment are supplied out of the public revenue; but this fact seems to us to afford no reason for our putting a construction upon the statute of *Elizabeth*, contrary to its natural meaning, prejudicial to the rate-payers in the parish, and unauthorized by any prior decision. Poor's rate continuing to be paid in respect

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(a) 12 *A. & E.* 84, 93.

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of these premises as hitherto, no serious obstacle can be presented to the successful progress of this laudable institution; and any deficiency in its funds from this payment will no doubt be made good, Parliament shewing itself just as well as generous.

For these reasons we give

Judgment for the respondents.

Saturday,
May 7th.

THE QUEEN *against* ARTHUR HILLS.

An indictment for a nuisance was removed into this Court by certiorari, at the instance of defendant, who entered into recognizance, with two manucaptors, under stat. 5 & 6 W. & M. c. 11. s. 2. Defendant was convicted.

On his being called up for judgment, an order was made by con-

sent, respiting the judgment until a report should be made, as to the nuisance, by a referee, and ordering the costs to be taxed. The costs were taxed; but the referee refused to undertake the reference. The defendant not having, on demand, paid the taxed costs, the prosecutors issued a *f. fa.*, which proved unfruitful: afterwards the defendant became bankrupt: and the prosecutors proved the taxed amount of costs under the bankruptcy; upon which a dividend of 2s. 10d. was declared.

After this, defendant was called up for judgment and sentenced: the prosecutors thereupon took out a side bar rule for taxation; and the allocatur was given for a sum including the amount formerly taxed, with a small addition for the costs of the last bringing up for judgment. Defendant and his bail not having paid these costs, a motion was made to attach him, and to estreat the recognizances.

Held that, as against defendant, the rule must be discharged, the proof in bankruptcy having been made for substantially the same sum as that in the last allocatur.

But that, as against the bail, the facts supplied no answer: and the rule against them was made absolute.

BOVILL, in last Term, obtained a rule calling on the defendant to shew cause why a writ of attachment should not issue against him, for his contempt in not paying the sum of 243*l.* 15*s.* 9*d.*, pursuant to a rule of this Court and an allocatur of the Master on the Crown side, made thereon; and calling also on the defendant, *Joseph Graham* and *Henry Gastineau*, the bail of the defendant in this prosecution, to shew cause why the recognizances of the defendant and of his said bail, entered into on removing the indictment in this prosecution into this Court, should not be estreated into the

Exchequer. On notice to the defendant and his said bail.

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The following facts appeared from the affidavits on which the rule was obtained.

The indictment, which was for a nuisance in carrying on a manufactory of oil of vitriol, was removed into this Court by certiorari, on defendant entering into the usual recognizance. Defendant pleaded to the indictment; which was tried at the *Surrey* Spring Assizes, 1851; when defendant was found Guilty. Judgment was signed on 30th *April* 1851: and defendant was brought up for judgment on 8th *May* 1851; when the Court, by consent, made a rule that the judgment should be respited till after the report after mentioned; and that it should be referred to the coroner and attorney of this Court to tax the costs to be paid by the defendant to the prosecutors; and that it should be referred to Professor *Brande* (or, on his declining, to Mr. *Grove*), to report whether the factory could be carried on so as to prevent a nuisance &c.; the report to be made on or before the first day of the then next *Michaelmas* Term; and defendant to pay the expence of the reference. Professor *Brande* and Mr. *Grove* both declined to take the reference. Application was made, on behalf of the prosecutors, to the defendant, to consent to an enlargement of the time for making the report: but defendant refused to concur. The prosecutors (who had taken no intermediate step, because they understood that defendant proposed to remove his works), on 3d *February* 1852, carried in their bill of costs for taxation. The taxation was completed on 5th of *February*; and the taxed costs amounted to 227*l.* 16*s.* 11*d.* After some negotiation respecting the payment of these costs, which produced no result,

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the prosecutors, on 10th *February* 1852, caused a fi. fa. to be issued for the amount of the costs, which, on 11th *February*, was levied on goods in *Surrey*, as goods of defendant. On 12th *February*, the agent of the prosecutor was served with an interpleader summons, on behalf of the sheriff of *Surrey*. On the hearing before the Judge, there was produced a bill of sale of all defendant's effects, executed by defendant to his brother *Frank Clark Hills*. The prosecutors, in consequence, abandoned the levy. In the same month a fiat in bankruptcy issued against defendant. He was adjudged a bankrupt; and prosecutors proved the costs, as a debt, under the bankruptcy. It was sworn, on information and belief, that there would be only a small dividend. On 7th *June*, 1852, defendant was brought up for judgment, and was thereupon fined a shilling and discharged. The prosecutors drew up the usual side bar rule, on final judgment; and, on 14th *June*, 1852, the Master taxed the costs, including in his taxation the costs taxed upon the rule of 8th *May* 1851. The defendant's attorney objected to the Master giving an allocatur, stating that he should apply to set aside the side bar rule: and the Master consented to postpone the allocatur. On 17th *June*, a Judge, at chambers, made an order to suspend the allocatur until after the 4th day of *Michaelmas* Term next. Defendant not having made any application within the first four days of *Michaelmas* Term, the prosecutors obtained an appointment to take the allocatur: and, on 9th *November*, 1852, the Master gave his allocatur for 243*l.* 15*s.* 9*d.*, which included the costs taxed under the rule of 8th *May*, 1851. It was deposed, on information and belief, that no dividend had yet been declared under the bankruptcy.

Defendant obtained his certificate on 19th *May*, 1852. The side bar rule and allocatur were served on defendant and each of the bail; and payment demanded: but no payment had been made.

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In opposition to the rule it was deposed that, under the interpleader summons, an issue was directed: but the prosecutors did not proceed with it; and an order was made that the sum of 240*l.*, which had been paid into Court by the claimant under the bill of sale to abide the event, should be repaid to the claimant, with the costs of the interpleader issue. A dividend of 2*s.* 10*d.* in the pound had been declared; of which notice had been given to the prosecutors: and a dividend warrant was in the hands of the official assignee ready to be handed over to the prosecutors. On the attendances for taxation, under the side bar rule, the defendant's attorney protested against the taxation, on the ground that the costs had already been taxed under the rule of 8th *May* 1851, and the amount upon such taxation proved under the bankruptcy. The sum allowed upon the allocatur was the amount of the costs, as first taxed, with an addition for the costs of the last bringing up for judgment.

M. Chambers and *Bramley* now shewed cause. The prosecutors have elected to proceed for the costs, first, by execution, and, next, under sect. 182 of The Bankrupt Law Consolidation Act, 1849 (stat. 12 & 13 *Vict.* c. 106.), by proving under the bankruptcy. After this, they cannot proceed by attachment against the defendant, under stat. 5 & 6 *W. & M.* c. 11. s. 3. [Lord *Campbell* C. J. Are you not concluded by the allocatur?

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Should you not have applied to set the side bar rule aside? That was the course pursued in *Regina v. Wilson* (a).] It is enough to shew, so far as the defendant is concerned, that there has been no contempt: and this is shewn by the prosecutor's having received what is legally satisfaction from the defendant. Then, as to the bail, the side bar rule is not taken out as against them; and this would have been the answer if they had applied to set it aside. [Lord Campbell C. J. Might they not have applied, as being prejudiced by it?] They are not prejudiced till they are called upon. [Lord Campbell C. J. Mr. Jones, the Master, reports to us that, when the side bar rule is obtained, the officers do not proceed to taxation till notice has been given to the bail.] The bail are not called upon to shew cause, and have therefore no absolute right to appear: that is the proper test of their position; not whether they would be allowed to appear. Then, on the merits, neither the defendant nor his bail are liable to pay these costs. There is nothing to prevent the prosecutors from obtaining them by the future dividends under the bankruptcy. The bail are merely security for the defendant, who, under these circumstances, cannot be considered as having made failure to pay. There can be no estreat unless there be a party grieved, under stat. 5 & 6 W. & M. c. 11. s. 3. But how are the prosecutors aggrieved, when they have obtained a legal satisfaction for their costs? There is no express provision in the statute for estreating the recognizance: nor can there be any equitable ground for doing so, where the prosecutors have elected to have recourse to

(a) 1 E. & B. 597.

another remedy. [Lord *Campbell* C. J. I do not understand how a surety, which is the character in which you place the bail, is discharged by a creditor having received a part from the principal.] How much is to be enforced from the bail under such circumstances? [*Crompton* J. That is a question for the Exchequer, upon application for mitigation.] Further, the prosecutors, having consented to the rule of 8th *May* 1851, have precluded themselves from any remedy which they might have under the recognizance by the ordinary course of obtaining final judgment and taking a side bar rule for taxation. By taking a substituted remedy against the principal they discharge the surety.

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Bovill, contra. As to the last point, the bargain, if it be one, was not fulfilled, the money not having been paid upon the first taxation. As to the proof under the bankruptcy, the allocatur and judgment are posterior to the bankruptcy. At any rate the rule must be absolute as against the bail. In *Regina v. Thornton* (a) an indictment had been removed by certiorari; and the defendant was convicted: he had been through the Insolvent Court, after being taken in execution for the costs, and was without money. The recognizance having been estreated, the Court of Exchequer stayed the proceedings on the recognizances as against the defendant, but refused to relieve the bail. (He was then stopped by the Court.)

LORD CAMPBELL C. J. The rule cannot be supported as against the defendant: the sum which must be looked upon as the principal debt has been proved under the bankruptcy. But, as to the application to estreat, no

(a) 4 *Exch.* 820.

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WIGHTMAN, ERLE and CROMPTON J^s. concurred.

“Ordered, That so much of the rule, made the last Term, as calls upon the defendant to shew cause why a writ of attachment should not issue against him for his contempt in not paying the sum of 243*l.* 15*s.* 9*d.*, pursuant to a rule of Court, and the allocatur of the Master on the Crown side of this Court made thereon, and why the recognizance of the said defendant, entered into on removing the indictment in this prosecution into this Court, should not be estreated into the Exchequer, be now discharged. And it is further ordered, that the recognizances of *Joseph Graham* and *Henry Gastineau*, the bail of the defendant in this prosecution, entered into on removing the indictment in this prosecution into this Court, be estreated into the Exchequer.”

Saturday,
May 7th.

The QUEEN against The Governor, Deputy Governor, Assistants and Guardians of the Poor in the Town of KINGSTON UPON HULL.

The town clerk is not entitled to charge the overseers of parishes for the duties

which he performs in respect of the registration of parliamentary voters of a borough, under stat. 6 & 7 *Vict.* c. 18. By sect. 55 the parish officers are to repay to him his “expences incurred;” but these words apply only to such moneys as he has properly expended, not to remuneration for his labour.

HUGH HILL, in last Term, obtained a rule calling on the defendants to shew cause why a mandamus should not issue, commanding them to pay to *Thomas*

Thompson, town clerk of the town of *Kingston upon Hull*, out of the moneys in their hands collected or to be collected for the relief of the poor of the United Parishes of *Holy Trinity* and *St. Mary*, in *Kingston upon Hull* aforesaid, the sum of 48*l.* 9*s.* 2*d.*, being the balance remaining unpaid of the sum of 90*l.* 10*s.* 6*d.*, mentioned in a certificate referred to in the affidavit read upon granting the rule.

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In the affidavit of *Thomas Thompson*, upon which (among others) the rule was obtained, the following facts were deposed to. By stat. 5 G. 4. c. xiii. (local and personal, public, "for the better maintenance, employment and regulation of the poor of the town of *Kingston upon Hull*, and for repairing or rebuilding the workhouse there") the parishes of *Holy Trinity* and *St. Mary*, in the borough of *Kingston upon Hull*, are united for the purposes of the poor laws; and certain persons are incorporated for the management of the poor thereof, by the name of *The Governors, Deputy Governors, Assistants and Guardians of the poor in the town of Kingston upon Hull*. And, by the same Act, the said Corporation are invested with, and required to exercise, all the powers and authorities with which churchwardens and overseers of the poor, or any of them, by any laws, made or to be made, in all or any case touching the application of any of the rates made for the use of the poor, are or shall be invested: and they are authorized and empowered to do and perform all and every such acts. *Thompson* became town clerk of the borough in 1837: and it was then agreed that, instead of the town clerk charging against the borough fund separate charges and fees in a bill of costs in respect of the business he should transact for the municipal

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Corporation, he should be paid from the borough fund an annual salary of 400*l.*, and should not be entitled to any further or other remuneration from the borough fund, except for money actually paid out of pocket. But such salary is only paid in respect of business done by him for the municipal Corporation: and, deponent stated that if any third party should employ the deponent, in his capacity of town clerk, in matters that could not have been chargeable by him against the borough fund, he had always been, and still is, at liberty to make his charges against, and to be paid by, such third parties for such employment. After his appointment, stat. 6 & 7 *Vict. c. 18.* ("to amend the law for the registration of persons entitled to vote, and to define certain rights of voting, and to regulate certain proceedings in the election of members to serve in Parliament for *England and Wales*") passed. The affidavit referred to several of the clauses of this Act, and further stated that, between 9th *May* and 3d *November* 1851, deponent, in his capacity of town clerk, at a great expence of money, time and labour to himself, and of the time and labour of his clerks and printers, caused to be carried into effect the matters to be done on the part of town clerks pursuant to the Act last mentioned, in preparing and printing the register of persons entitled to vote at any election of members of Parliament for *Kingston upon Hull* which might take place between 30th *November* 1851 and 1st *December* 1852. He laid the account of his expences, as soon as he conveniently could, before the Town Council of *Kingston upon Hull*. The account, pursuant to a general rule of the Town Council, was laid before the Property Committee of the Council; and they reported the amount of the expences to the Town Council, namely 153*l.* 1*s.* 10*d.*, and appor-

tioned the expences among the parishes and townships according to the number of names in each (a): and they found that the parishes of *Holy Trinity* and *St. Mary* should together pay 90*l.* 10*s.* 6½*d.* And the committee recommended the council to allow the account and to grant a certificate under the common seal for payment. Whereupon the council ordered: "That the town clerk's bill of costs for carrying into effect the provisions of the Parliamentary registration Act, 6th *Vict.* chap. 18., be, and the same is, hereby allowed at 153*l.* 1*s.* 10*d.*; and that a certificate thereof be issued to the town clerk under the common seal, and of the sum to be paid by, and as the contribution of, each parish and township in the borough towards defraying the same, as follows: that is to say" &c., stating the proportions as before, according to the report. The certificate was issued accordingly, under the common seal, stating the amounts to be paid, referring to stat. 6 & 7 *Vict. c.* 18., and adding: "and, pursuant to the said Act, the overseers of the poor of the said respective parishes and townships are hereby forthwith, on notice hereof, out of the first moneys which shall come to their hands for the relief of the poor, to pay to the said town clerk the sum in this certificate mentioned, to be paid by the parish or township of which they shall respectively be overseers, as the contribution of the said parish or township to the said town clerk." *Thompson* served a copy of the certificate on the *Governor, Deputy Governor, Assistants and Guardians of the poor of the town of Kingston upon Hull*; and their clerk paid him 40*l.* 1*s.* 6*d.*: but the residue remained unpaid, though, as was deposed on

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(a) Stat. 6 & 7 *Vict. c.* 18. s. 55.

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information and belief, they had in their hands money collected for the relief of the poor more than sufficient to pay the 90*l.* 10*s.* 6½*d.*

From the affidavit in answer, it appeared that one item of *Thompson's* charge was for payment to the printer: and the 40*l.* 1*s.* 4*d.*, which had been paid to *Thompson*, was the portion of this single item due from the parishes of *Holy Trinity* and *Saint Mary* according to the proportion before calculated: but all the other items "were for professional fees and charges of attendances, and business done and performed by the said *Thomas Thompson*, or his clerk or clerks." The affidavit further set out the resolution (of 17th *May*, 1837) passed by the town council immediately before the election of *Thompson*; namely: "Resolved: that in future the town clerk be elected annually on the 9th day of *November*, and to hold his office during the pleasure of the council: and that his salary be at the rate of 400*l.* per annum; and that, in consideration of such salary, the town clerk shall perform all the duties appertaining to the office of town clerk, committee clerk, common law, chancery, and other business whatsoever; that he shall have an office at the town hall, open daily for business, and shall not be entitled to any further remuneration for the performance of such duties from the borough fund than the salary of 400*l.* per annum, except for money actually out of pocket: and that any wages paid to clerks and assistants shall not be considered money out of pocket."

Watson and *Bovill* now shewed cause. The question turns upon the meaning of the words "expences incurred," in sect. 55 of stat. 6 & 7 *Vict. c.* 18. This term

applies merely to such money as the town clerk has had to advance: for his personal services, and those of his clerks (which must be on the same footing), he is paid by the remuneration which he receives from the municipal Corporation. In this case he is paid by an annual salary. But the parochial authorities have nothing to do with the arrangements between the municipal Corporation and their officers. It does not appear that he has had to hire any clerk for this specific service. In *Jones v. Mayor of Carmarthen* (a) Lord Abinger said that for services which the town clerk performed under the express directions of the Reform Act, or the Municipal Corporation Act, he could claim no remuneration. In the present case the principle applies more strongly; for stat. 6 & 7 *Vict. c. 18.* does prescribe remunerations in particular instances, as in that of the revising barristers; sect. 59. If there be any claim, it is on the town council: the parish officers, in which character the defendants stand, are liable only under the words of the statute. The certificate of the council carries the case no further: the council has no power to issue such certificate except in the case of "expences incurred."

Hugh Hill and *W. S. Cross*, *contra*. Very onerous duties are laid upon the town clerk under this statute. It can hardly have been contemplated by the Legislature that these were to be performed gratuitously. The question on sect. 55 is at least new: and a return will enable the parties to have it decided upon the record.

Lord CAMPBELL C. J. We would make the rule

(a) 8 *M. & W.* 605.

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absolute, if there were any doubt, so as to have a return. But there is not a particle of doubt. "Expences incurred" means simply money which the town clerk has had to pay. He wants to charge for his time. No doubt he has been very usefully employed: but that is not incurring an expence.

WIGHTMAN J. I agree entirely: the claim must be brought within the terms of sect. 55; but it is quite inapplicable to them.

CROMPTON J. (a). It is clear that the words "expences incurred," in that section, are applicable only to what the town clerk has to pay; not to his labour.

Rule discharged.

(a) *Erle J.*, having been absent during a part of the argument, delivered no opinion.

Monday,
May 9th.

The QUEEN *against* JOHN WILLIAM HARDEN,
Esq.

The amount paid for carrying into force an order of two justices to abate a nuisance, under stat. 11 & 12 Vict. c. 123., may, under the provisions of sect. 3, be recovered in the county court from the owner of the premises where the nuisance existed, though title to land comes in question. Semble: that title comes in question if the party sued, as owner of land, denies that he is owner.

PASHLEY, in last *Hilary Term*, obtained a rule nisi for a mandamus directed to the judge of the county court of *Cheshire* holden at *Northwich*, commanding him to order payment at such time, and by such instalments, as he should think fit, of the sum of 18*l.* 15*s.*, for which judgment had been given in the

said county court in a plaint between the Guardians of the Poor of the *Northwich* Union, plaintiffs, and *Charles Aiken Holland*, defendant.

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From the affidavits on both sides, it appeared that the plaint was by the Guardians of the Poor of the *Northwich* Union, to recover the amount paid for carrying into force an order of two justices to abate a nuisance in a ditch, under The Nuisances Removal and Diseases Prevention Act, 1848, 11 & 12 *Vict. c. 123*. This sum they claimed from Mr. *Holland* as owner of the ditch: and the defence was that he was not owner of the ditch. The defendant in the plaint applied to *Crompton J.* at chambers, on the 9th *October*, for a prohibition, on the ground that title came in question, and, consequently, that the county court had no jurisdiction. *Crompton J.*, without expressing any opinion, dismissed the summons, on the parties consenting to stay proceedings in the county court till *November 17th*, so that the defendant might have an opportunity to apply to the Court in the Term if he pleased. No application was made. The plaint came on to be tried; when the judge of the county court expressed his own opinion to be that title did come in question, and that he had no jurisdiction, but, apparently under a mistaken impression that *Crompton J.* had decided the point, left the case to the jury, who found for the plaintiffs. He afterwards declined to make any order for payment, on the ground that he thought himself without jurisdiction.

Willes and *Holland* now shewed cause. Title to land is in question here; for the defendant was charged as owner of the ditch, and his defence was that he was not

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owner. Stat. 9 & 10 *Vict. c. 95. s. 58.* excludes cases in which title to land is in question from the jurisdiction of the county court. It is immaterial whether the plaintiff sets up title in the defendant to charge him *ratione tenuræ* and the defendant denies it, or whether the defendant sets up title in himself and the plaintiff denies it. The latter is the more common case; but title is equally in question whether it is claimed as a benefit or disclaimed as a burthen.

Pashley, *contra*. If this were an action at common law, probably the county court would have no jurisdiction; for the title to the ditch does seem to come in question. But it is an action given by stat. 11 & 12 *Vict. c. 123. s. 3.*, which enacts that "all costs and expences reasonably incurred in obtaining such order, or in carrying the same into effect, shall be deemed to be money paid for the use and at the request of the owner or occupier of the premises in respect whereof such costs and expences shall have been incurred, and may be recovered as such by the said Town Councils, Trustees, Commissioners, Guardians, Officers of Health, or other body, or by the said Procurators Fiscal, Deans of Guild, Commissioners of Police, or Trustees and Inspectors of the Poor respectively, in any county court, Civil Bill Court, or (in *Scotland*) before the Sheriff or Magistrates or Justices of the Peace:" or at the option of the plaintiffs they may go before two justices. So the act creates a new right, and expressly limits the remedy in England to actions in the county court, or to a proceeding before two justices. No action could lie in any other court; and the Legislature, knowing that the amount might be more than 20*l.*, and that

title might come in question, nevertheless gave the jurisdiction to the county court.

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LORD CAMPBELL C. J. If this case had depended upon the construction of stat. 9 & 10 *Vict. c. 95. s. 58.*, I should have been of opinion that the judge had no jurisdiction, for that the title to the land might, and in this case did, *bonâ fide* come in question. But stat. 11 & 12 *Vict. c. 123. s. 3.* expressly gives the remedy in the county court; and, unless that court has jurisdiction, there is no remedy by action at all; for the Guardians of the Poor have no capacity to sue but what is given to them by the statute. It is a new right given by statute, with a specific remedy, which may and must be pursued.

WIGHTMAN J. This case does not depend upon the construction of stat. 9 & 10 *Vict. c. 95. s. 58.*, but on that of stat. 11 & 12 *Vict. c. 123. s. 3.*, which gives a special jurisdiction to the county court or to two justices. It would be strange if the Legislature entrusted questions of this sort, whether they involved title or not, to two justices, and excluded the county court when title came in question.

ERLE J. I also think that the judge has jurisdiction given him, under sect. 3, to try whether these costs are due from the defendant as owner, and therefore has jurisdiction to try whether he is owner. It will open a wide enquiry, and may raise a very complicated question of title; but express power is given to the judge of the county court to try that question.

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CROMPTON J. I also think that jurisdiction is expressly given. There are two modes given to recover those costs, in the county court or before two justices. Those express remedies exclude all others. The justices can try it though title comes in question: and it would be strange if we were to say that the jurisdiction was taken from the judge of the county court, but left to the justices.

Rule absolute.

The next case is inserted here on account of its connection with the case which follows it.

[Friday,
June 18th,
1852.]

Ex parte PHILLIPS.

Under stats.
1 & 2 Vict.
c. 110. s. 96.
and 10 & 11
Vict. c. 102.
s. 10., the
Court for the
relief of Insol-
vent Debtors
has no jurisdic-
tion to re-
hear a case
heard before
a judge of the
county court
on a petition
transmitted to
such judge
from the Court
first mentioned.

GRIFFITS, in *Trinity Term* (a) 1852, moved for a rule calling on the Commissioners of the Court for the relief of Insolvent Debtors to hear an application for the rehearing of *Robert George Clabburn*.

From the affidavits in support of the motion, it appeared that *Clabburn*, about 4th *March* 1852, being then a prisoner for debt in the gaol of the City of *Norwich*, filed a petition in the Court for the relief of Insolvent Debtors, which was heard at *Norwich* before the judge of the county court. *Robert Charles Phillips* appeared as a creditor, to oppose the discharge: but the judge disallowed the proof of the debt, and *Phillips* was not permitted to be heard in opposition. The insolvent

(a) *June* 3d. Before Lord Campbell C. J., Coteridge, Wightman and Erie Js.

was discharged, upon the hearing. Application was made, on 21st *May* 1852, to the Court for the relief of Insolvent Debtors for a rehearing, on the part of *Phillips*: but the learned Commissioner (a) who presided was of opinion that the Court had no jurisdiction. The present motion was made on behalf of *Phillips*: and the affidavits stated the merits.

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 PHILLIPS.

Griffiths, in support of his motion. Sect. 96 of stat. 1 & 2 *Vict. c.* 110. gives power, in certain cases, to the Court for the relief of Insolvent Debtors to rehear, upon proper grounds shewn. The original hearing, under that statute, took place before the Court, or a Commissioner on circuit, or, if the prisoner was in custody in *Berwick upon Tweed*, before the justices of that town. By stat. 10 & 11 *Vict. c.* 102. s. 10. the circuits of the Commissioners are abolished: and (except within the district mentioned in sect. 6) the Court, by sect. 10, is to make an order for hearing in the county court of the district within which the insolvent is confined. But many of the judges of the county courts consider that they have no power given to them by this section, either expressly or by implication, to rehear. The judge of the county court is to return the proceedings, with his judgment, to the Court for the relief of Insolvent Debtors, to be kept among the records of the latter Court. The Commissioners on circuit had a power distinct from that of their Court; and so indeed had the indi-

(a) *W. J. Law Esq.* *Griffiths*, in moving, stated that the opinion of *Mr. Law*, explaining his reasons for considering that the Court had no jurisdiction in a similar case, had been printed: and a copy was handed up to the Bench.

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vidual Commissioners in *London*, as under sect. 28 of stat. 1 & 2 *Vict. c. 110*. Sect. 96 of that statute makes the order on the hearing, unless there be a rehearing as there directed, "final and conclusive." It cannot have been intended, by stat. 10 & 11 *Vict. c. 102. s. 10.*, to abolish the rehearing altogether: and the Court, of which the proceedings are a record, seems to be the proper tribunal for exercising that power. It was so held in a case where the hearing had been before a Commissioner on circuit, antecedently to the passing of stat. 10 & 11 *Vict. c. 102.*, but the application for a rehearing was after that statute; *Re Willcox (a)*.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

Upon a motion for a mandamus to the Commissioners of the Court for the relief of Insolvent Debtors, to hear an application for an order for the rehearing of the case of an insolvent under stat. 1 & 2 *Vict. c. 110. s. 96.*, the question has been raised, whether, in respect of an insolvent heard before the judge of a county court, and discharged by him, under stat. 10 & 11 *Vict. c. 102. s. 10.*, the Court for the relief of Insolvent Debtors has jurisdiction to make the order applied for.

And we are of opinion that this question must be answered in the negative. There is no provision expressly giving this power to the Court of the Commissioners over the cases heard by the judge of the county court: and the provision in sect. 96 of the former Act

does not, in terms or in principle, apply to these cases. In terms it does not apply to county courts: and in principle, although it was reasonable to vest the power of deciding or rehearing in a tribunal of which all, or at least one, of the judges had presided over the former hearing, it would be inconvenient to require that a tribunal should have to decide whether a judge has been deceived, either by false evidence or otherwise, without having power of communicating officially with that judge upon a matter depending chiefly on what passed in his own mind.

The rule must be refused, unless the jurisdiction exists in the Insolvent Debtors' Court. It is not necessary to decide that the jurisdiction exists in any other tribunal. We forbear, therefore, to say more, with respect to the power of the county court judges, than that the words of sect. 10, conferring jurisdiction on them to hear originally, appear wide enough to comprehend a power of rehearing: and we find no words restricting their power within the limits of the powers exercised by the Commissioners upon circuit.

Rule refused.

[1852.]

Ex parte
PHILLIPS.

1853.

*Monday,
May 9th.*

The QUEEN *against* ALFRED DOWLING, Serjeant at Law, Judge of the County Court of YORKSHIRE, holden at YORK.

(In the matter of WHITE.)

An insolvent debtor, resident in the district of the county court of *Y.*, more than 20 miles from the General Post Office, petitioned the Court for the relief of Insolvent Debtors.

His petition and schedule were transmitted to the judge of the county court of *Y.*, by whom, after hearing, he was discharged; and the schedule and petition were returned to the Court for the relief of Insolvent Debtors. Afterwards, some of his creditors

GRIFFITS, in last *Hilary* Term, obtained a rule nisi for a mandamus, commanding the judge of the county court of *Yorkshire* holden at *York* to issue his warrant to bring up *William White*, an insolvent debtor, for a rehearing in the matter of the petition and schedule of the said insolvent.

The rule was obtained on affidavits shewing that *William White*, a debtor confined in *York Castle*, petitioned the Court for the relief of Insolvent Debtors, and filed his schedule. The Court for the relief of Insolvent Debtors transmitted the petition and schedule to the judge of the county court at *York*, being the court within the district of which the insolvent was in custody: and, after hearing, the insolvent was discharged on the 22d *March* 1852 by the judge of the county court. In *June* 1852, certain creditors petitioned the judge of the county court for a rehearing, on the ground of fraud. The judge declared his opinion, to be that the jurisdiction

applied to the judge of the county court for an order for a rehearing on the ground of fraud. The judge granted a rule; but the insolvent did not appear. Application was made to the judge for a warrant to apprehend him. The insolvent was out of the district of the *Y.* county court. The judge refused to act. This Court, under these circumstances, made a rule absolute for a mandamus to issue a warrant, as in the opinion of the majority, *Crompton J.* dissentiente, the judge of the county court had jurisdiction to do that. But the Court refused to express any opinion as to whether the warrant could be executed out of the district.

tion to order a rehearing was in the Court for the relief of Insolvent Debtors, to which the schedule and petition had been returned; and he then declined to act. The decision of this Court in *Ex parte Phillips* (a) having taken place subsequently, the Court for the relief of Insolvent Debtors, in deference to that decision, again transmitted the petition and schedule to the judge of the county court; and a fresh application for a rehearing was made on 28th *August* in the county court, of which the insolvent had notice. The judge granted a rule nisi. On 27th *September* the rule was made absolute on an affidavit of service. The rule absolute was served on the insolvent, who did not appear.

On 22d *November* an application was made for a warrant to apprehend the insolvent and bring him up. The judge, after taking time to consider, said: "If you are right in assuming this to be the only tribunal before which the insolvent can be reheard, I think your argument in support of the application is well founded. At the same time I would suggest that, as my power is derivable solely from the statutes, the terms of which are very ambiguous, it would be safer to apply to the Court above for a mandamus. And, if a mandamus be granted, I shall of course have no objection to grant your application." The affidavits on the other side shewed the additional fact that the insolvent, *White*, was, at the time of the application and still, resident out of the district of the county court of *Yorkshire* holden at *York*.

Bramwell and *Charles Pollock* now shewed cause. The real question is, whether the judge of the county

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(a) Ante, p. 192.

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court has jurisdiction to issue such a warrant. It is clear that he has not, unless such power is given to him by statute. Stat. 1 & 2 *Vict. c. 110. s. 30.* enacted that the Commissioners should make circuits, and that, upon a prisoner's "appearance before such Commissioner on his circuit, it shall be lawful for such Commissioner to make all such orders, and to give all such directions, and to do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, and his schedule, and his creditors and assignees, as the said Court for the relief of Insolvent Debtors may make, give, or do in the matters of petitions heard by the said Court, according to this Act; and that in each and every matter to be heard and inquired into by such Commissioner, according to the provisions of this Act, such Commissioner shall have the same power as the said Court would have therein if the same were heard and inquired into by the said Court; and that all judgments, rules, orders, directions, and proceedings pronounced, made, and done in all and every the matters aforesaid by such Commissioners, shall be transmitted to the said Court, signed by such Commissioner, to be a record of the said Court, and to be kept as such among the records thereof." Sect. 96 enacts: "that every such adjudication as aforesaid by the said Court, Commissioner, or justices as aforesaid, with respect to any prisoner, and the order thereupon, so made as aforesaid, shall be final and conclusive, and shall not be reviewed by the said Court, unless the said Court shall thereafter see good and sufficient cause to believe that such adjudication has been made on false evidence, or otherwise improperly made or fraudulently obtained, in which case it shall be lawful

for the said Court, upon the application of such prisoner, or of any creditor of such prisoner, to order such prisoner, upon due notice to be given to such persons and in such manner as the Court shall direct, to attend or be brought up, and the said matter to be reheard before the said Court, or one of the Commissioners thereof on his circuit, or such justices as aforesaid, as the case may require, who shall thereupon rehear the same, and shall and may, if just cause shall appear, annul the original adjudication and order thereupon made in such case, and shall have the same powers and authorities upon such rehearing as upon any original hearing in pursuance of this Act, and may adjudicate in such matter accordingly; and thereupon, in case the former adjudication in the said matter shall not be confirmed, such order, certificate, and warrant shall be made as required by this Act to be made upon such original adjudication; and the said Court or Commissioner or justices shall and may, if necessary, remand the said prisoner to the same custody in which he was at the time of the former hearing of the matters of his petition, there to be subject to imprisonment as if the former adjudication therein had not been made; and thereupon all detainers which were in force against such prisoner at the time of his former discharge from custody shall be deemed to be still in force against him as if such former adjudication had not been made; and the gaoler or keeper of the prison to which such prisoner shall be so remanded shall and is hereby required to receive such prisoner into his custody in pursuance of such remand, for doing which the order of remand in such case shall be his sufficient warrant; and where in any case such prisoner shall refuse or neglect to appear before the said Court or

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Commissioner or justices, according to such order for rehearing as aforesaid, a copy whereof shall have been duly served on such prisoner, it shall be lawful for the said Court to order such prisoner to be apprehended, and committed to custody in such prison as the said Court shall direct, and to issue its warrant accordingly, and to cause such prisoner to be brought up for examination as often as to the said Court or Commissioner or justices shall seem fit."

Upon these enactments there was no difficulty. The Commissioner on circuit, under sect. 30, heard the petition of the insolvent. If there was ground for an application for a rehearing, that was to be made to the Court under sect. 96; and the Court, if it saw good cause, was to order the prisoner to attend a rehearing, which might be before the Court or a Commissioner on circuit: and, if the prisoner did not appear, he might be apprehended. But the Commissioner could not set aside the adjudication or rehear except on the order of the Court: and, if the insolvent did not appear, it was the Court, not the Commissioner on circuit, that might order him to be apprehended. Then stat. 10 & 11 *Vict. c. 102. s. 10.* abolished the circuits of the Commissioners, and enacted that, if a prisoner in a country district should petition the Court for the relief of Insolvent Debtors, the Court, or one Commissioner, should "make an order referring such petition for hearing to the county court within the district of which such insolvent debtor is in custody, and shall transmit such petition and schedule to such court for hearing accordingly; and that the judge of such court shall appoint a time and place for such prisoner to be brought up before such court, and cause the usual notices to be given;

and that any court to which any such petition shall be so referred and transmitted shall have and possess the same power and authority with respect to every such petition, and shall make all such orders, give all such directions, and do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, his schedule, creditors, and assignees, as the said Court for the relief of Insolvent Debtors or any Commissioner thereof might make, give, or do in the matters of petitions heard before such Court or Commissioner under such Acts; and that every such petition and schedule, and all judgments, rules, orders, directions, and proceedings pronounced, made, and done thereon in all and every the matters aforesaid by such county court, shall be returned to the said Court for the relief of Insolvent Debtors, signed by the judge of such county court, to be a record of the said Court for the relief of Insolvent Debtors, and to be kept as such among the records thereof; and the said Court for the relief of Insolvent Debtors, and every Commissioner thereof, in every case in which any insolvent debtor petitioning the Court for the relief of Insolvent Debtors under such Acts shall be in custody in any of Her Majesty's gaols within the district to which the jurisdiction of such Court is limited aforesaid, and the county courts in the matter of every such petition so referred and transmitted for hearing as aforesaid, shall have power to issue a warrant or order, directed to the governor, keeper, or gaoler of any gaol, directing him to bring the insolvent before the county court on the day appointed for the hearing of his petition, or at any adjourned sitting held in the matter of this petition, and every such governor, keeper, or gaoler shall obey such

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warrant; and every such court may order the expence attending the bringing up of every such insolvent to be paid by the provisional assignee out of the estate and effects of such insolvent, or if there be no estate, or the same be insufficient for such purpose, out of the interest and profit arising from any government securities upon which any unclaimed money produced by the estates and effects of insolvent debtors may be invested."

The effect of this is to transfer to the county court the jurisdiction to hear which formerly belonged to the Commissioners on circuit. That jurisdiction begins on the petition and schedule being transmitted to the county court, by the Court for the relief of Insolvent Debtors; for an insolvent debtor cannot petition the county court directly. The powers of the county court are given in words very nearly the same as those used in stat. 1 & 2 Vict. c. 110. s. 30., giving the powers to a Commissioner on circuit; and, when the hearing is completed, by both enactments, the proceedings are to be returned to the Court for the relief of Insolvent Debtors, there to be kept as a record of that Court. When that is done, the duty of the county court under stat. 10 & 11 Vict. c. 102. s. 10. is over. But stat. 10 & 11 Vict. c. 102. has made no provision as to the manner in which the jurisdiction to rehear, given by stat. 1 & 2 Vict. c. 110. s. 96., is to be exercised. It certainly was not intended to abolish it. As the proceedings are all of record in the Court for the relief of Insolvent Debtors, it had been suggested that the proper course would be that that Court should have the jurisdiction to order a rehearing. But the Court of Queen's Bench, in *Ex parte Phillips* (a), refused a rule Nisi for a

(a) *Ante*, p. 192.

mandamus commanding the Commissioners of that Court to determine a similar application. In deference to that decision the judge of the county court has received the application in this case, and has taken every step down to the issuing of the warrant to arrest the insolvent. If he takes that step, even in obedience to a mandamus, he takes it at his peril; for, if he has not jurisdiction, he is liable to an action for false imprisonment. And the facts here raise a difficulty which was not brought to the attention of the Court in *Ex parte Phillips* (a), and which goes far to shew that there was an error in that decision. For here the insolvent is not within the district of the judge of the county court; and consequently there is no officer, to whom he can direct his warrant, capable of executing it. No such difficulty arises if the Court for the relief of Insolvent Debtors is to act; for that Court may direct its warrant to its messenger, who is not limited to a local jurisdiction. When the insolvent is in custody under their warrant, they may send him to the county court. If the words of stat. 10 & 11 *Vict. c. 102. s. 10.* are to be construed as transferring to the judge of the county court all the powers of the Court for the relief of Insolvent Debtors in respect of those petitions once transmitted to him, they must also transfer the powers of that Court under sects. 88 and 98 of the earlier statute, in both of which power is given to commit the prisoner to any goal; yet no machinery is provided by which the judge of the county court can commit a prisoner to a gaol out of his district. All these difficulties are avoided if the construction of the statute is, that the jurisdiction given to the judge of the county court is in lieu of that of the

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(a) Ante, p. 192.

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Griffiths, in support of his rule. The words of stat. 10 & 11 *Vict. c. 110. s. 10.*, that the judge of the county court "shall have and possess the same power and authority with respect to every such petition" transmitted to him as the Court for the relief of Insolvent Debtors, are not to be found in stat. 1 & 2 *Vict. c. 102. s. 30.*, and seem intended to give the full powers. (He was then stopped by the Court.)

LORD CAMPBELL C. J. The rule may be made absolute to the extent asked for. The only question seems to be whether the judge of the county court has power to order a rehearing; for, if he has that power, I think all the rest follows. It seems to me that stat. 10 & 11 *Vict. c. 110. s. 10.* does vest in the judge of the county court the jurisdiction, for that purpose, which was previously in the Court for the relief of Insolvent Debtors: and, if it does, it gives him all the power necessary to execute that jurisdiction; and he may issue his warrant, which is all the rule asks for. We will not however grant a mandamus to do that which might bring the Judge into peril; and therefore we direct nothing as to the manner in which it is to be executed if the insolvent continues out of the district. On that we give no opinion: it would be premature to do so. I refrain from examining the contradictory sections of these ill drawn Acts; as I have good hopes that the Legislature will speedily repeal them, and introduce more intelligible enactments.

WIGHTMAN J. I think the words in stat. 10 & 11 *Vict. c. 102. s. 10.* are larger than those in stat. 1 & 2 *Vict. c. 110. s. 30.*, and authorize the judge to rehear, and therefore to issue his warrant. I do not enter into the question how it is to be executed.

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CROMPTON J. I had not the benefit of hearing the discussion before the judgment in *Ex parte Phillips (a)*; probably, if I had, it might have changed what is my present opinion. But, bowing to the authority of that decision, though I cannot say my mind goes along with it, I must hold that the jurisdiction to order a rehearing is not in the Court for the relief of Insolvent Debtors. And I perfectly concur in thinking that, if that be so, the rest follows, and that the judge of the county court may issue his warrant.

The rule was, after some discussion, varied, and made absolute "to issue his warrant pursuant to the statute."

(a) *Ante*, p. 192.

[1852.]

The following two cases are inserted here on account of their connection with *Morris v. Bosworth*, post, p. 213.

[*Thursday*,
January 29th,
1852.]

ORCHARD *against* MOXSY.

In a case where the Court of Queen's Bench had concurrent jurisdiction with the county court by stat. 9 & 10 *Vict. c. 95. s. 128.*, the plaintiff recovered only 40*s.* damages. This sum he accepted from the defendant without prejudice to any claim for costs: and he summoned the defendant to shew cause before a Judge at chambers why the costs should not be taxed, and paid by defendant to

THIS was an action of trespass for false imprisonment, tried at *Westminster*, before Lord Campbell C. J., at the sittings after *Easter Term*, 1851. The jury found a verdict for the plaintiff, with 40*s.* damages. The plaintiff resided, and the whole cause of action arose, within the jurisdiction of the county court for the *Clerkenwell* district of *Middlesex*; the defendant resided within the jurisdiction of the county court for the *Whitechapel* district, and had no place of business elsewhere (a). The plaintiff's attorney accepted the 40*s.* from the defendant's attorney without prejudice to the plaintiff's right to costs; and he afterwards took out a summons to shew cause, at chambers, why the plaintiff's costs should not be taxed, and paid to him by the defendant. *Patteson J.* in *Trinity Term*, 1851, heard the parties on the summons (b), and, considering it to be in

plaintiff. The Judge, considering that a discretion on this point was vested in him by stat. 13 & 14 *Vict. c. 61. s. 13.*, refused to make an order. In the next term but one after this decision, the plaintiff moved the Court of Queen's Bench that the costs might be taxed, and paid to him by the defendant; relying on a decision of the Court of Common Pleas, since the hearing at chambers, that the Judge, under sect. 13, was bound to grant costs.

Held that the application was too late.

Quære, whether the enactment in stat. 13 & 14 *Vict. c. 61. s. 13.*, that the Judge, in the cases there mentioned, "may" order costs, be imperative or only permissive.

(a) See stat. 9 & 10 *Vict. c. 95. s. 128.*

(b) There were two actions of *Orchard v. Mossy*, brought by brothers against the same defendant for the same alleged trespass. The summons

his discretion, under stat. 13 & 14 *Vict. c. 61.* sects. 11 and 13, to grant or withhold the order for taxation, refused to grant it. Afterwards (*December 6th 1851*) the Court of Common Pleas gave judgment in *Macdougall v. Paterson (a)*, laying down, in contradiction to the decisions of the Court of Exchequer in *Jones v. Harrison (b)* and *Palmer v. Richards (c)*, that the words "may thereupon" "direct that the plaintiff shall recover his costs," in stat. 13 & 14 *Vict. c. 61. s. 13.*, are imperative, and leave no discretion to the Judge (*d*). The plaintiff then took out another summons, to the same effect as the first: and *Erle J.*, on the hearing at chambers, referred the matter to the full Court. A rule nisi for an order to tax plaintiff's costs was obtained accordingly in *Hilary Term (January 13th) 1852.*

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Sir *F. Thesiger* (with whom was *Phipson*) now shewed cause, and contended that the plaintiff, having already brought the question before a Judge and failed, could not now repeat his application, merely because a new decision upon the subject had been given by one of the Courts.

Paterson, contra, was then called upon by the Court. The plaintiff's demand is a matter of right. [Lord *Campbell C. J.* How long is that right to continue? Must not it be enforced in a reasonable time?] The plaintiff is entitled to his costs by the Statute of *Glou-*

was taken out in one of the causes, and this motion was made in the other; but, on the present argument, the decision in the other case appears to have been taken as equivalent to a decision in this.

(a) 11 *Com. B.* 755.(b) 6 *Exch.* 328.(c) 6 *Exch.* 335.(d) See *Crake v. Powell*, post, p. 210.

[1852.]

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cester ; and there is no Statute of Limitations applicable.

[*Coleridge J.* You have taken the decision of a Judge at chambers, and have let two terms pass without disturbing it.] That was under the belief, created by the decisions in the Exchequer, that the Judge at chambers might exercise a discretion. It has now been shewn that that construction of the statute is disputable. [*Coleridge J.* Suppose all that was done at chambers had been done here: we should not now hear you. Lord *Campbell C. J.* Could the unsuccessful parties in the two cases in the Exchequer apply to that Court now? Or could the party who failed in the Common Pleas take that course, if we should agree in opinion with the Court of Exchequer?] In *Merrick v. Wakley (a)* a motion to this Court, raising a question as to costs as affected by stats. 3 & 4 *Vict. c. 24.* and 4 & 5 *Vict. c. 28.*, was made more than three years after the trial of the cause.

Lord CAMPBELL C. J. This application is too late, the plaintiff having accepted the damages, and acquiesced so long in the decision of the Judge at chambers. It is said that the application is a matter of right: but it must be made within some reasonable time. The hearing at chambers was in last *Trinity Term*. The plaintiff lies by till *December*. Then a judgment is pronounced in another Court; and the plaintiff, finding that to be in

(a) 11 *L. J. N. S.* 249, *Q. B.* Not published in these reports. It appears by the affidavits in that case that the plaintiff did not sign judgment till three years had elapsed after the jury process was returnable; and the motion (under stat. 4 & 5 *Vict. c. 28. s. 2.*, to stay proceedings on such terms as the Court should think fit) was made in the next term but one. The case contains nothing else material to the present report: and the decision of the Court related to questions upon which it is not thought necessary to report the case.

his favour, asks us to reverse the decision given by a Judge of this Court. I think it would be most inconvenient if such a course could be taken. The consequence might be that a party would lie by for a great length of time, and then come to the Court for costs of a past suit to a large amount, when the opposite party was no longer in a situation to pay them. I say this without giving any intimation whether I adhere to the ruling of the Court of Common Pleas or to that of the Exchequer.

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COLERIDGE J. It is a rule that the party who intends to complain of the decision of a Judge at chambers must come speedily; otherwise the opposite party may have supposed that every thing was settled, and have acted accordingly, so as to disable himself from paying the costs. We cannot estimate the amount of inconvenience in one or another case which may occur; but, when Mr. *Paterson* admits that he must contend for a right to come at any time, he is out of Court.

PATTERSON and WIGHTMAN Js. concurred

Rule discharged.

[1852.]

[Tuesday,
February 10th,
1852.]

CRAKE *against* POWELL.

Where a plaintiff, in an action in the Superior Courts, recovers damages not exceeding those named in stat. 13 & 14 Vict. c. 61. s. 11., but shews, to the satisfaction of the Court or of a Judge at chambers, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts and county courts under stat. 9 & 10 Vict. c. 95. s. 128., or for which no plaint could have been entered in a county court, or which has been removed from a county court by certiorari, he is entitled, under stat. 13 & 14 Vict. c. 61. s. 13., to his costs *ex debito justitiæ*; and the Court or Judge has no discretion as to granting or refusing them.

IN this case, in *Hilary* Term 1852, previously to the argument and decision reported in the preceding case, *Griffiths* had obtained a rule, calling on the defendant to shew cause why it should not be referred to one of the Masters of this Court to tax the plaintiff's costs herein, and why the defendant should not pay the costs when taxed.

It appeared, from the affidavits in support of the rule, that this was an action of debt, tried before the Secondaries of the Sheriffs of *London*, on 17th *December* 1851, when a verdict was found for the plaintiff for 4*l.* 12*s.* 6*d.* The action was commenced by writ of summons issued out of this Court on 25th *September* 1851. At the time of such commencement, defendant dwelt and carried on his business at *Romsey*, in *Hampshire*; and plaintiff then dwelt and carried on his business at the *York Road, Lambeth, Surrey*, which was more than twenty, namely seventy, miles distant from defendant's said dwelling. The action was not relating to, or concerning or in respect of, any claim to any goods and chattels taken in execution of the process of any other Court, or the proceeds or value thereof; nor was any such question in dispute in the cause. On 17th *December* 1851, the plaintiff took out a summons requiring defendant to shew cause why plaintiff should not recover his costs. This

was attended, on 18th *December*, before *Coleridge J.*, who referred the case to the full Court. The only question raised before the learned Judge was whether he had a discretion as to the exercise of his power to order costs.

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After the decision of the preceding case, in the same term (*a*),

Lush shewed cause; and *Griffiths* was heard in support of the rule. The judgment makes it unnecessary to report the arguments.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

In this case we are, for the first time, to give our opinion whether, under sect. 13 of stat. 13 & 14 *Vict. c. 61.*, it is discretionary in a Court, or Judge at chambers, to direct that the plaintiff shall recover his costs, where it is made to appear, to the satisfaction of the Court or Judge, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts and the county courts, or for which no plaint could have entered in any county court, or that the said cause was removed from a county court by certiorari.

We have the advantage and the embarrassment of finding that this question has already been decided by the Court of Exchequer (*b*) and the Court of Common Pleas (*c*), and decided different ways. Having, in the

(*a*) *January 31st*, 1852; before Lord Campbell C. J., *Patteson*, *Coleridge* and *Wightman J.*s.

(*b*) *Jones v. Harrison*, 6 *Exch.* 328; *Palmer v. Richards*, 6 *Exch.* 335.

(*c*) *Macdougall v. Puterson*, 11 *Com. B.* 755.

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discharge of our duty, considered very attentively the words of the statute and the reasons given by the learned Judges of the two Courts, we agree with those of the Common Pleas, which exhaust the subject, and which therefore we need not repeat. We will only observe that, in looking to discover in what sense the word "may" is here used by the Legislature, we are chiefly struck by the consideration that sect. 11 of stat. 13 & 14 *Vict. c. 61.*, taking away the right to costs which before existed, excepts from its operation the cases *thereinafter provided*, and therefore seems expressly to declare that in the three cases provided for by sect. 13 the plaintiff shall still be entitled to costs: all that remains is to point out how he shall recover them; and that is by a rule or order for that purpose. If the plaintiff be entitled to costs, and the Court or Judge is empowered to make a rule or order for that purpose, *ex debito justitiæ* he may call upon the Court or Judge to do so.

Mr. *Lush* raised a new argument, from its being left discretionary, by sect. 12, in the Judge at the trial to certify that it appeared to him that the cause of action was one for which a plaint could not have been entered in the county court. But, however strange it may seem that this case should be introduced into sect. 12, as well as sect. 13, it could hardly have been the intention of the Legislature to expose the plaintiff to the peril of ultimately losing his costs by language so little adapted to express such an intention, where he had no choice to sue in the county court, and was driven to seek his remedy in one of the Superior Courts as before the county court acts passed.

In this case, it being proved to our satisfaction that the action was brought for a cause in which concurrent

jurisdiction is given, by reason of the parties residing at the distance from each other of seventy miles, we are of opinion that we are bound to direct that the plaintiff shall recover his costs. The rule for that purpose will therefore be absolute.

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Rule absolute (*a*).

(*a*) See now stat. 15 & 16 *Vict. c. 54. s. 4.*

MORRIS *against* BOSWORTH.

Monday,
May 9th.

GARTH, in this term, obtained a rule calling on the defendant to shew cause why the plaintiff should not be allowed his costs.

From the affidavit in support of the rule, it appeared that the action was commenced in this Court. After issue was joined in the action, the case was referred to arbitration: and, on *June 9th 1852*, an award was given for the plaintiff for 6*L* 18*s*. 5*d*. The action was assumpsit, for money lent, money paid, money had and received, interest, and on an account stated. Defendant had paid 10*L* into Court.

At the time of the commencement of the action, defendant dwelt at *Humberstone* cottage in *Leicestershire*, and the plaintiff in the parish of *Shelford* in *Nottinghamshire*; which two places were more than twenty miles apart.

On 7th *February 1853*, a summons was issued, calling on defendant to shew cause why plaintiff should not recover his costs. The summons was heard on 19th *February*, before *Erle J.*: when it was objected, on the

After issue joined in an action of assumpsit commenced in this Court, the case was referred, and, on 9th *June 1852*, an award was given for the plaintiff for less than 20*L*. The parties dwelt more than twenty miles apart. In *Hilary Vacation, 1853*, a summons was taken out to shew cause why plaintiff should not have his costs, under stat. 13 & 14 *Vict. c. 61. s. 13.* Held, not too late.

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part of the defendant, that the application was too late; and reference was made to *Orchard v. Moxsy (a)*, and to a case said to have been recently decided at chambers by *Alderson B.* Upon this the learned Judge ordered that the case should stand over, to be referred to the full Court, and that the application should be considered as having been made to the Court on the day the summons was issued.

In this term (*b*),

Lush shewed cause. The application was too late. *Orchard v. Moxsy (a)* is not strictly in point, inasmuch as there the question was as to the proper time for applying to the full Court against the decision of a Judge at chambers. Here the question is as to the original application to the Judge. The award, which may be considered as tantamount to a verdict, was given on *June 9th 1852*; and the application not till *Hilary Vacation 1853*. There must be some limit as to time: the most reasonable would appear to be the first four days of the term following the verdict, according to the analogy of motions for new trials. The question is at present before the Court of Exchequer.

Garth, contra, referred to *Harper v. Carr (c)* and *Norman v. Danger (d)*.

LORD CAMPBELL C. J. We will inquire as to the case before the Court of Exchequer.

Cur. adv. vult.

(a) Ante, p. 206.

(b) May 7th: before Lord Campbell C. J., *Wightman* and *Crompton* Js.

(c) 7 T. R. 448.

(d) 3 F. & J. 203.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

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In this case, we have consulted the learned Barons of the Exchequer; and they agree with us that the application for costs is not too late. My brother *Erle* abstained from making the order, on the supposed authority of a decision of my brother *Alderson* at chambers. That decision, however, proceeded upon a misunderstanding as to *Orchard v. Moxsy (a)*, where the question was as to the time within which an appeal from the order of a Judge at chambers should be made. Here the question is as to the application to the Judge in the first instance: and we all agree that the plaintiff is not prejudiced by the interval which has occurred.

Rule absolute (*b*).

(a) Ante, p. 206.

(b) See *Reid v. Gardner*, 8 Exch. 651.

END OF EASTER TERM.

The Court did not sit in banc in the Vacation after *Easter Term*.

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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM,

XVI. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

LORD CAMPBELL C. J.
COLERIDGE J.

ERLE J.
CROMPTON J.

LUMLEY *against* GYE.

1st and 2d
counts of de-
claration, by
lessee of a
theatre: for

THE 1st count of the declaration stated that plaintiff
was lessee and manager of the *Queen's Theatre*, for

maliciously procuring *W.* (who had agreed with plaintiff to perform and sing at his theatre and no where else for a certain term) to break her contract and not to perform or sing at plaintiff's theatre, and to continue away during the term for which *W.* was engaged. 3d count, averring that *W.* had engaged with plaintiff to be, and had become and was, plaintiff's dramatic artiste for a certain term, and complaining that plaintiff maliciously procured her to depart out of her said employment during the term. On demurrer:

Held, by *Wightman, Erle and Crompton Js.*, that the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only *in fieri*, provided the procurement be during the subsistence of the contract, and produces damage: and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. *Semble*, by the same Judges, that

performing operas for gain to him; and that he had contracted and agreed with *Johanna Wagner* to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing: Yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with *Wagner* was in force, and before the expiration of the term, enticed and procured *Wagner* to refuse to perform: by means of which enticement and procurement of defendant, *Wagner* wrongfully refused to perform, and did not perform during the term.

Count 2, for enticing and procuring *Johanna Wagner* to continue to refuse to perform during the term, after the order of Vice Chancellor *Parker*, affirmed by Lord *St. Leonards* (a), restraining her from performing at a theatre of defendants.

Count 3. That *Johanna Wagner* had been and was hired by plaintiff to sing and perform at his theatre for a certain time, as the dramatic artiste of plaintiff, for reward to her, and had become and was such dramatic artiste of plaintiff at his theatre: Yet defendant, well knowing &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged.

privity to it. And that, as a dramatic performer is not a servant, therefore all bad.

The defendant had, under stat. 15 & 16 Vict. c. 76. s. 80., obtained leave to plead and demur also. On an application to postpone the trial of the issues in fact till the issue in law had been finally disposed of in a Court of Error:

Held: that the Court had no power to make such an order; inasmuch as the judgment on the demurrer had disposed of the issue in law, finally as far as regarded this Court.

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the action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result and did result to the plaintiff.

Coleridge J. dissentiente, and holding that the action for procuring a third person to depart from his engagement is founded on the Statute of Labourers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was within that statute; and that, in all other cases, the remedy for a breach of contract is only on the contract, and against those the counts were

(a) See *Lumley v. Wagner*, 1 De G. McN. & G. 604.

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Demurrer. Joinder.

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The demurrer was argued in the sittings after *Hilary* Term last (*b*).

Willes, for the defendant. The counts disclose a breach of contract on the part of *Wagner*, for which the plaintiff's remedy is by an action on the contract against her. The relation of master and servant is peculiar; and, though it originates in a contract between the employer and the employed, it gives rise to rights and liabilities, on the part of the master, different from those which would result from any other contract. Thus the master is liable for the negligence of his servant, whilst an ordinary contractor is not liable for that of the person with whom he contracts. And a master may lawfully defend his servant when a contractor may not defend his contractee. And so a master may bring an action for enticing away his servant. But these are anomalies, having their origin in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and, though they have been continued long after all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case *Wagner* is a dramatic artiste, not a servant in any sense. (It is unnecessary to report the argument for the defendant further in detail, as the points made in it, and the authorities relied upon, are fully stated in the judgments of *Crompton J.* and *Wightman J.*)

Cowling, contra. The general principle is laid down

(a) *February* 4 and 5, 1853; before *Coleridge*, *Wightman*, *Erie* and *Crompton Js.*

in *Comyns's Digest, Action upon the Case* (A). "In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." In *Comyns's Digest, Action upon the Case for Misfeasance* (A 6.), an instance is given: "If he threaten the tenants of another, whereby they depart from their tenures," citing 1 *Rol. Abr.* 108. *Action sur Case* (N) pl. 21. An action lies for procuring plaintiff's wife to remain absent; *Winsmore v. Greenbank* (a). An action lay for ravishment of ward; and, if "a man procureth a ward to go from his guardian, this is a ravishment in law;" 2 *Inst.* 440. Now, as neither the tenants, the wife nor the ward are servants, it cannot be said that the action for procurement is an anomaly confined to the case of master and servant. "Every master has by his contract purchased for a valuable consideration the services of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given a remedy by a special action on the case: and he may also have an action against the servant for the nonperformance of his agreement." 3 *Bl. Com.* 142. *Blackstone* thus treats the action by a master as an example of a general rule that "inducing a breach of contract" is an injury for which an action lies. And surely any one, not a lawyer, would agree that the malicious and intentional procurement of a breach of contract was a wrong, and that the breach of contract intended to be procured was the direct consequence of that wrongful procurement. *Green v. Button* (b) is apparently an authority for that larger proposition; and

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(a) *Willcs*, 577.

(b) 2 C. M. & R. 707.

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so is *Sheperd v. Wakeman* (a). It is not accurate to say that the remedy for breach of contract is confined to those privy to the contract; *Levy v. Langridge* (b). In that case the son recovered though the warranty was to the father. It is true that the damage to the plaintiff must be the natural and immediate consequence of the wrong of the defendant, and that it is not often that the unjustifiable act of an independent party is the natural consequence of that wrong; but, when, as on this demurrer must be taken to be the fact, the defendant uses the contracting party as his tool to break the contract to the damage of the plaintiff, why should he not be answerable for the damage he thus intentionally produces? The procurement may in some cases be privileged, just as a libel or slander may be: but here it is malicious. It is, however, unnecessary to go so far in this case, as the contract is for exclusive personal services, and the authorities are clear that in such cases the action lies. (The arguments for the plaintiff on this part of the case, and the authorities cited, are so fully stated in the judgments that it is unnecessary to repeat them here.)

Willes, in reply. The averment of malice can make no difference. If the action does not lie without malice, it does not lie with it; and malice is never averred in actions for seducing servants. The passage cited from *Comyns's Digest, Action upon the Case* (A), does not throw much light on the matter. It is not disputed that damage resulting from a wrong gives a cause of

(a) 1 Sid. 79.

(b) 4 M. & W. 337; affirming the judgment of the Exchequer in *Langridge v. Levy*, 2 M. & W. 519.

action; but the defendant's point is that the act complained of is not a wrong within the technical meaning of the word: and this is an instance of the rule, *ex damno sine injuriâ non oritur actio*. The instances cited, as supporting the general proposition, all range themselves under some well known class of wrongs. The reference in *Comyns's Digest, Action upon the Case for Misfeasance* (A 6.), is to 1 *Roll. Ab.* 108. *Action sur Case*, (N) pl. 21.; where it appears that the menaces were to "tenants at will, of life and limb." The tenants therefore were not bound to remain; and the threats of life and limb must have been an interference with the plaintiff's property. Ravishment of ward also proceeds on the ground that the guardian had a property in his ward. *Winsmore v. Greenbank* (a) extends the law as to enticing servants to enticing a wife; but the principle is the same. The common law considers the wife the property and servant of the husband. In *Sheperd v. Wakeman* (b) the action was for asserting that the plaintiff was already married, per quod she lost her marriage: but to assert that a woman is about to commit bigamy is actionable per se. *Levy v. Longridge* (c) was decided on the ground that there was what was equivalent to a fraudulent representation to the plaintiff as to an article which he was to use. The act complained of in *Green v. Button* (d) was also a wrong in itself. The injury done was analogous to slander of title. (The argument in reply, as to the effect of the contract being for exclusive service, is sufficiently shewn by the judgments.)

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Cur. adv. vult.

(a) *Willes*, 577.(b) 1 *Sid.* 79.(c) 4 *M. & W.* 337.(d) 2 *C. M. & R.* 707.

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Crompton J.

In this term (*June 3*) the learned Judges, being divided in opinion, delivered their judgments seriatim.

CROMPTON J. The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss *Wagner*, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before the expiration of the period for which Miss *Wagner* was engaged, wrongfully and maliciously enticed and procured Miss *Wagner* to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss *Wagner* wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss *Wagner*'s engagement was then stated. The third count stated that Miss *Wagner* had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss *Wagner* was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby

she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss *Wagner's* engagement was then stated. To this declaration the defendant demurred: and the question for our decision is, Whether all or any of the counts are good in substance?

The effect of the two first counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and *had become and was* the dramatic artiste of the plaintiff for reward to her; and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss *Wagner*; that Miss *Wagner* was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his

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servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Labourers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever

the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue: and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly shewing that such distinction exists. The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that shew these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. In *Blake v. Lanyon* (a) it was held by the Court of King's Bench, in accordance with the opinion of Gawdy J. in *Adams v. Bafeald* (b), and against the opinion of the two other Judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently. It is

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(a) 6 T. R. 221.

(b) 1 Leon. 240.

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there said that " a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service." This appears to me to shew that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake v. Lanyon* (a) the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was; but, inasmuch as there was a binding contract of service with the plaintiffs, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harbouring servants after the first actual service had been put an end to have been frequent; see *Pilkington v. Scott* (b), *Hartley v. Cummings* (c). In *Sykes v. Dixon* (d), where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the bar or the Court that the action would fail on account of there having been no actual service at the time of the second hiring or the harbouring; but the question as to there being, or not being, a binding contract of service in existence at the time seems to have been regarded as the real question.

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss *Wagner* had become

(a) 6 T. R. 221.

(b) 15 M. & W. 657.

(c) 5 Com. B. 247.

(d) 9 A. & E. 693.

the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. Two *Nisi prius* decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, *Ashley v. Harrison* (a), was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage: and Lord *Kenyon* held the action not maintainable. This decision appears, especially from the report of the case in *Espinasse*, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This

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(a) 1 *Peake's N. P. C.* 194. *S. C.* 1 *Esp. N. P. C.* 48.

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was pointed out as the real reason of the decision by Mr. *Erskine* in the case of *Tarleton v. M'Gawley* (a), tried at the same sittings as *Ashley v. Harrison* (b). The other case, *Taylor v. Neri* (c), was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services; and Lord Chief Justice *Eyre* said that he did not think that the Court had ever gone further than the case of a menial servant; for that, if a daughter had left the service of her father, no action per quod servitium amisit would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action; and he said that the record stated that *Breda* was a servant hired to sing, and in his judgment he was not a servant at all; and he nonsuited the plaintiff. Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants per quod servitium amisit, and which differ from actions of the present nature for the wrongful enticing or harbouring with notice, as pointed out by Lord *Kenyon* in *Fores v. Wilson* (d), it is clear from *Blake v. Lanyon* (e) and other subsequent cases, *Sykes v. Dixon* (g), *Pilkington v. Scott* (h) and *Hartley v. Cummings* (i), that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor v. Neri* (c). In *Blake v. Lanyon* (e) a journeyman who was to work by the piece, and who had left his work

(a) 1 *Peake's N. P. C.* 207.(b) 1 *Peake's N. P. C.* 194. S. C. 1 *Esp. N. P. C.* 48.(c) 1 *Esp. N. P. C.* 386.(d) 1 *Peake's N. P. C.* 55.(e) 6 *T. R.* 221.(g) 9 *A. & E.* 693.(h) 15 *M. & W.* 657.(i) 5 *Com. B.* 247.

unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the Court in that case, that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss *Wagner* had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule; but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it" (a), that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well recognised class of cases. In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. *Cowling* is not tenable, or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract

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(a) Per Holt C. J., in *Keeble v. Hickeringill*, 11 East, 573. 575., note (a) to *Carrington v. Taylor*, 11 East, 571.

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and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, *with a malicious intent to ruin a rival trader*, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action (a). In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant: and it would seem unjust, and contrary to the general princi-

(a) See note (4) to *Skinner v. Gunton*, 1 Wms. Saund. 230.

ples of law, if such wrongdoer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. *Cowling* on this part of the case seem well worthy of attention.

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Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services *during the period for which she had so contracted*, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

EARLE J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related

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to contracts respecting trade, manufactures or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to shew that the principle has been recognised. In *Winsmore v. Greenbank* (a) it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and

(a) *Willes*, 577.

other cases of contracts is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button* (a) it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd v. Wakeman* (b) is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison* (c) and in *Taylor v. Neri* (d) it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shewn to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird v. Randall* (e) is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made

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(a) 2 C. M. & R. 707.

(b) 1 Sid. 79.

(c) 1 Peake's N. P. C. 194. S. C. 1 Esp. N. P. C. 48.

(d) 1 Esp. N. P. C. 386.

(e) 2 Burr. 1345.

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responsible. The remedy on the contract may be inadequate, as where the measures of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

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WIGHTMAN J. (a). This was a demurrer to a declaration in an action against the defendant for, maliciously, and with intent to injure the plaintiff, causing, procuring and enticing Miss *Wagner*, who had contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

(a) Lord Campbell C. J. read this judgment, *Wightman J.* being absent in consequence of indisposition.

The declaration contained three counts. The two first are for, wrongfully and maliciously, enticing and procuring Miss *Wagner* to refuse and make default in the performance of an executory contract, entered into by her with the plaintiff to sing and otherwise perform at his theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, without alleging that Miss *Wagner* was in the service and employ of the plaintiff, and that she left such service and employ by the procurement and enticement of the defendant. The third count states that Miss *Wagner*, before the committing the grievances complained of by the plaintiff, had been and was hired and engaged by the plaintiff to sing and perform at his theatre, from the 15th *April* 1852 to the 15th *July* following, as the dramatic artiste of the plaintiff, and that she had become and was such dramatic artiste of the plaintiff, and that the defendant, well knowing the premises, wrongfully and maliciously enticed and procured the said Miss *Wagner* to depart from and out of the said employment of the plaintiff, and to continue absent from it until the end of the period for which she was engaged. The two first counts are for maliciously procuring Miss *Wagner* to break a contract for service, and to refuse to perform it; and the third is for maliciously procuring her to depart from the employment of the plaintiff.

It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged; which ought •

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not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged, that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule, and are not to be extended; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended, for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract, into which he has entered, and by which refusal the plaintiff has sustained an injury; and, though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such action was maintainable; and the authority of Lord Chief Baron *Comyns* was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss *Wagner* to break her contract, and the consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the *injuria*, and the *damnum*; but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking her contract was the spontaneous act of Miss *Wagner* herself, who was under no obligation to yield to the persuasion or procurement of the defendant.

And the case of *Vicars v. Wilcocks* (a), which though it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by Lord Chief Justice Tindal in *Ward v. Weeks* (b), that the damage in that case, as well as in *Vicars v. Wilcocks* (a), was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button* (c), in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case, that, as the persons in whose custody the goods were were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff: but the Court held the action to be maintainable, though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause, and the damage accruing thereby. In *Winsmore v. Greenbank* (d) the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him, during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff, whereby he

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(a) 8 East, 1.

(c) 2 C. M. & R. 707.

(b) 7 Bing. 211. 215.

(d) Willes, 577.

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would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs, and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good, and that it sufficiently appeared that there was both *damnum* and *injuria*: it was *primâ facie* an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act: and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour in the present case. It was undoubtedly *primâ facie* an unlawful act on the part of Miss *Wagner* to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so; and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of the two cases referred to, of *Green v. Button* (a) and *Winsmore v. Greenbank* (b), as well as upon general principle, that an action on the case is maintainable. A doubt was expressed by Lord *Eldon*, in *Morris v. Langdale* (c), whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage, that,

(a) 2 C. M. & R. 707.

(b) *Willes*, 577.

(c) 2 Bos. & Pul. 284. 289.

by reason of the speaking of the words, other persons refused to perform their contracts with him; Lord *Eldon* observing that that was a damage which might be compensated in actions by the plaintiff against such persons. It has, however, been remarked with much force by Mr. *Starkie*, in his *Treatise on the Law of Libel*, vol. 1. p. 205 (2nd edition), that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt indeed is hardly sustainable on principle; and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs; as in the case of *Newman v. Zachary (a)*, where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. Upon the whole, therefore, I am of opinion that, upon the general principles upon which actions upon the case are founded, as well as upon authority, the present action is maintainable.

It is not, however, necessary, for the maintenance of the third count of the declaration at least, to rely upon so general a principle; for the case, at all events, appears to me to fall within the cases which the defendant considers are exceptions to a general rule, and in which actions have been held maintainable, for procuring persons to quit the service in which they had been retained and employed. The defendant con-

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tends that the exception is limited to the cases of apprentices and menial servants and others to whom the provisions of the Statutes of Labourers would be applicable. It appears to me however, upon consideration of the cases cited upon the argument, that the right of an employer to maintain an action on the case for procuring or inducing persons in his service to abandon their employment is not so limited; but that it extends to the case of persons who have contracted for personal service for a time, and who during the period have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they had contracted to serve. The right to maintain such an action is by the common law, and not by the Statute of Labourers, which however gives a remedy, which the common law did not, in cases where persons, within the purview of the Statute, have voluntarily left the service in which they were engaged, and have been retained by another who knew of their previous employment. In *Brooke's Abridgement*, tit. *Laborers*, pl. 21 (a), it is said: In trespass it was agreed that at common law, if a man had taken my servant from me, trespass lay vi et armis; but if he had procured the servant to depart and he retained him, action lay not at common law vi et armis, but it lay *upon the case* upon the departure by procurement. In the case of *Adams v. Bafeald* (b), where the plaintiff declared that his servant departed his service without cause and the defendant knowing him to be his servant retained him, two Judges out of three held that the action did not lie at common

(a) See the case more fully stated in the judgment of *Coleridge J.*, post, p. 255.

(b) 1 *Leo.* 240.

law unless the defendant procured him to leave the service. In all these cases the words "servant" and "service" are used; but there is nothing to indicate the kind of servant or of service in respect of which the dicta and decisions occurred. There is a case in the *Yearb. Mich.* 10 H. 6. pl. 30. fol. 8 B., in which it is said that an action does not lie against a chaplain upon the Statute of Labourers for not chaunting the mass; for it is said he may not be always disposed to sing, and can no more be coerced by force of the statute than a knight, esquire or gentleman. There is no doubt but that the Statute of Labourers only applied to persons whose only means of living was by the labour of their hands. It was passed in the 25th year of *Edward* the 3rd (a), and recites that so many of the people, especially workmen and servants, had died of the plague that those that remained required excessive wages, and that there was lack of ploughmen and such labourers, and then obliged every person within the age of sixty, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land which he may till himself, to serve whoever might require him at such wages as were paid in the twentieth year of the King's reign or five or six other years before. The remedies and penalties given by this and the next subsequent Statute of Labourers were limited to the persons described in them; but the remedies given by the common law are not in terms limited to any description of servant or service. The more modern cases give instances, and contain dicta of Judges, which appear to warrant a more extended application of the right of action for

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(a) Stat. 1.

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procuring a servant to leave his employment than that contended for by the defendant. In *Hart v. Aldridge* (a) the plaintiff brought an action for enticing away the plaintiff's servants who worked for him as journeymen shoemakers. It appeared that they worked for the plaintiff for no determinate time, but only by the piece, and had, at the time of the enticing away, each a pair of shoes of the plaintiff unfinished. It was contended that a journeyman hired not for time but by the piece was not a servant; but Lord *Mansfield* said that by being found to be the plaintiff's "journeymen" they were found to be the plaintiff's servants. "The point turns upon the jury finding that the persons enticed away *were employed by the plaintiff as his journeymen*. It might perhaps have been different if the men had taken work for every body." In the present case, Miss *Wagner* was, as stated in the third count and admitted by the demurrer, *employed by the plaintiff as his dramatic artiste*. Can it make any real difference that in *Hart v. Aldridge* (a) the persons enticed were employed by the plaintiff as *his* journeymen shoemakers, and that in the present case Miss *Wagner* was employed by the plaintiff as *his* dramatic artiste? In both cases the services were the personal services of the persons engaged; and, though the description of the services was very different, the personal service being in the one case to make shoes, and in the other to sing songs, it seems to me difficult to distinguish the cases upon any principle: it is the exclusive personal service that gives the right. In *Blake v. Lanyon* (b), which was a case very similar in respect to the nature of the service to that of *Hart v. Aldridge* (a), it was stated by the Court,

(a) 1 *Cowp.* 54.(b) 6 *T. R.* 221.

as a general proposition, that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished." These cases appear to me to be very strong authorities in favour of the plaintiff, as far at least as regards the third count. Two cases however were cited for the defendant, as direct authorities against the maintenance of the present action. The first was that of *Ashley v. Harrison* (a), in which the plaintiff declared that he had retained Madam Mara to sing publicly for him in certain musical performances which he exhibited for profit at *Covent Garden Theatre*, but that the defendant, contriving to lessen his profits and to deter Madam Mara from singing, published a libel concerning her which deterred her from singing, as she could not sing without danger of being assaulted and ill treated in consequence of the libel. Lord *Kenyon* held, at *Nisi prius*, that the action was not maintainable, as the injury was too remote. The case does not appear to have undergone much discussion; it was only a decision at *Nisi prius*; but it is clearly distinguishable from the present, as Madam Mara was deterred from singing, not directly in consequence of any thing done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill treat her. The injury in that case may have been well held to be too remote; but it does not at all resemble this, where the loss is the *direct* consequence of the defendant's act. The other case was that of *Taylor v. Neri* (b), which certainly bears more directly upon the present. The declaration stated that the plaintiff, being manager

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of the Opera house, had engaged *Breda* to sing; that the defendant beat him; whereby the plaintiff lost his service. Lord Chief Justice *Eyre* expressed a doubt whether the action was maintainable, observing that, if such an action could be supported, every person whose servant, whether domestic or not, was kept away a day from his business could maintain an action. He was of opinion that *Breda* was not a servant at all. The case was very little discussed, was a decision at *Nisi prius*, and does not appear to have undergone much consideration; and, without adverting to some distinctions between that and the present case, it can hardly be considered as an authority of much weight for the defendant.

I am therefore of opinion that upon the whole case, as it appears upon these pleadings, the plaintiff is entitled to our judgment.

Coleridge J.

COLERIDGE J. The plaintiff in this case, by the first count of his declaration, shapes his case in substance as follows: he alleges a contract made between himself and *Johanna Wagner* for her to perform in his theatre in operas for a specified time, i. e. from the 15th *April* to the 15th *July*, on certain terms, and, among these, one that she was not during the time to sing or use her talents elsewhere than in his theatre without his written authority. He then complains that the defendant, knowing the premises, and maliciously intending to injure him and to prevent *Johanna Wagner* from performing according to her contract, whilst the agreement was in full force, but before the commencement of the term, on the 8th *April*, enticed and procured her to make default in singing or performing at the theatre,

and to depart from and abandon her contract, against his will and without his written authority, by means of which enticement and procurement she unlawfully and wrongfully wholly refused to perform her contract, and he sustained special damage. The 2d count applies to an enticement, after certain proceedings in equity, to *Johanna Wagner* to continue her default for the residue of the term. The 3d count states that *Johanna Wagner* was hired and engaged by the plaintiff to sing and perform at his theatre, for a certain time, as his dramatic artiste for reward, and had become and was such dramatic artiste, and complains that defendant, maliciously intending to injure him, enticed and procured her to depart from and out of his said employment. These counts are demurred to; and the demurrers raise the questions, Whether an action will lie against a third party for maliciously and injuriously enticing and procuring another to break a contract for exclusive service as a singer and theatrical performer: in the first place, while the contract is merely executory; in the second, after it is in course of execution? I make no distinction between the counts, and am of opinion that it will not in either case, and that the defendant is entitled to our judgment generally.

In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of *Johanna Wagner*. After much consi-

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 LUMLEY these propositions is true; and they are both of them so
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 Coleridge J. lead to consequences so general, that, though I regret
 the necessity, I must not abstain from entering into
 remarks of some length in support of my view of the
 law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 *Edw.* 3., and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to shew, as to the first, that he, and, as to the second, that *Johanna Wagner*, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavour, to

produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence: however complete the injuria, and whether with malice or without, if the act be after all sine damno, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between *A.* and *B.* that the latter should go supercargo for the former on a voyage to *China*, and *C.*, however maliciously, persuades *B.* to break his contract, but in vain, no one, I suppose, would contend that any action would lie against *C.* On the other hand, suppose a contract of the same kind made between the same parties to go to *Sierra Leone*, and *C.* urgently and bonâ fide advises *B.* to abandon his contract, which on consideration *B.* does, whereby loss results to *A.*; I think no one will be found bold enough to maintain that an action would lie against *C.* In the first case no loss has resulted; the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not *C.*'s, but entirely and exclusively *B.*'s own. If so, let malice be added, and let *C.* have persuaded, not bonâ fide but malâ fide and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is malitia sine

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damno, if the hurtful act is entirely and exclusively *B.*'s, which last circumstance cannot be affected by the presence or absence of malice in *C.* Thus far I do not apprehend much difference of opinion: there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which Lord *Kenyon* proceeded in *Ashley v. Harrison* (*a*). There the defendant libelled Madame *Mara*: the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord *Kenyon* nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a *procuring*. In *Winsmore v. Greenbank* (*b*) the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice, who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be

(*a*) 1 *Peake's N. P. C.* 194. *S. C.* 1 *Esp. N. P. C.* 48.

(*b*) *Willes*, 577.

bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable—as in trespass—even where it is used towards a free agent: the maxims, *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shews that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of *Winsmore v. Greenbank* (a) seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is

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rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank* (a). A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited (b), Judge *Hankford* (c) gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on

(a) *Willes*, 577.(b) *Mich.* 11 *H.* 4. fol. 23 A. pl. 46. post, p. 255.(c) *William Hankford*, Justice of the Common Pleas in 1398, afterwards, in 1414 (1 *H.* 5.), Chief Justice of England.

the case the argument *primæ impressionis* is sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it *is* important to find that the action has yet never been tried. Now we find a plentiful supply both of text and decision in the case of seduction of servants: and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of *Adams v. Bafeald* (a) and *Blake v. Lanyon* (b) are worth considering. In the first, two Judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay: and this reason is given: "the very act of giving him employment is

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(a) 1 Leon. 240.

(b) 6 T. R. 221.

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affording him the means of keeping out of his former service." Would the Judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Labourers, to which no reference was made. But I mention this case now as shewing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agents' resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given *malâ fide*, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them. According to all legal analogies, the *bona fides* of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued

jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord *Abinger* and my brother *Alderson* in the case of *Winterbottom v. Wright* (a); if we go the first step, we can shew no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence: they are not of slight importance, and could hardly have been decided without reference to the Courts in Banc. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.

I come now to the second proposition, that the decisions in respect of master and servant, and the seducing of the latter from the employ of the former, are exceptions grafted on the general law traceable up to the Statute of Labourers. This is of course distinct from the question of the extent of the exception, that is, to what classes of servants it applies:

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(a) 10 M. & W. 109.

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but the enquiries are so connected together in fact, and the latter has so obvious a bearing in support of the former, that it will be better to take them both together.

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Now, in the first place, I cannot find any instance of this action having been brought before the statute passed; the weight of which fact is much increased by finding that it was of common occurrence very soon after. The evidence for it is not merely negative; for the mischief and the cause of action appear to have been well known before, and the want of the remedy felt. The common law did give a remedy in certain cases; and Judges are found pointing out what that remedy was, and to what cases it applied. From the cases collected in *Fitzherbert's Abridgement*, tit. *Laborers*, it appears that the distinction between the action at common law and the action upon the statute was well known: wherever the former action lay it was in trespass, and not on the case: in saying which I do not rely merely on the words,—writ of trespass,—which might be applicable to trespass on the case; but I rely on the operative words of the writ, which stated a taking vi et armis: it might be joined with trespass quare clausum fregit or trespass for the asportation of chattels or false imprisonment. The count necessarily charged the *taking* of the servant out of the service of the plaintiff; whereas the writ upon the statute, as appears from *Fitzherbert's Natura Brevium*, 167 B., charges the retainer and admission of the servant into the defendant's service after he has been induced to withdraw, or has withdrawn without reasonable cause, from that of the plaintiff. I do not wish unnecessarily to multiply citations from the *Year Books*; but it will

be necessary to refer to some, and at greater length than they are found in the abridgments. I begin with one out of the order of time, because it is so full to the purpose, and because it may be referred to as abridged by *Brooke* (*Abridgement*, tit. *Laborers*, pl. 21.), I think incorrectly in a material point. He says that it was agreed in it, that case lay for the departure by procurement, but not where the servant departed without procurement and was afterwards retained. The case is *Year Book Mich.* 11 H. 4. (a), fol. 23 A., pl. 46. Not, as he cites it with a slight inaccuracy, 21. 22. “*Thomas Frome* brings writ of trespass at the common law against defendant for his close broken, and one *J.* his servant taken out of his service (*pris hors de son service*), and certain sheep driven away with force and arms.” There were different pleadings and much discussion as to the separate causes of action, which introduces some confusion into the case. As to the servant, *Tremain* pleaded: “we found him wandering in a certain place in another county; and there he came and offered his service to us, and made covenant with us to serve us; and so demands judgment.” *Skrene*, for the plaintiff, replies: “he has admitted that the servant was in our service, and that he has received him into his service; and so he has admitted our action.” *Hankford* (b) says, however: “When the servant was wandering, if the defendant had not cognizance that he was in your service, then this first receiver cannot be adjudged a wrong done by the defendant but by the servant.” Upon this *Skrene* amends his pleading, and says that the servant made a covenant with the plaintiff to serve him

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(a) A. D. 1409.

(b) Then Justice of Common Pleas. See ante, p. 250, note (c).

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in the office of "Berchier" (a) "for a whole year, within which year the defendant procured our servant to go out of our service, by force of which procurement he went out of our service within the year, and the defendant retains him in his service; which matter we wish to aver;" and demands judgment: on which Hill (b) says: "his writ of trespass as to the servant does not lie upon the matter shewn; for the plaintiff says that the defendant did nothing but procure the servant to go out of his service, by which procurement he went out of his service, and was retained with the defendant, in which case action on the Statute of Labourers is given, and not this action." Skrene argues: "If a man procures my servant to go out of my service, and retains him upon that, he does me wrong." Hankford and Hill both say, "True it is that he does you wrong: but you shall not have a remedy on this manner of writ as it is here." Culpeper (c): "This action is taken upon an action at the common law;" "and the actions which were at the common law before the Statute of Labourers are not taken away by that statute; and, if a man procure and abet my servant to go with him in his service, action at common law lies well. Hill: No certes, action at common law of trespass does not lie on such a case; for such a procurement cannot be said in any manner to be against the peace. Thirning (d): If my servant before the statute went out of my service, I suppose well that no action is given to the master; but if a man took my servant out of my service, there action of trespass lay at the common law, and still lies; and, if

(a) Shepherd.

(b) Robert Hill, Justice of the Common Pleas in 1408.

(c) John Colepeper, Justice of the Common Pleas in 1406.

(d) William Thirning, Chief Justice of the Common Pleas in 1396.

I *am beaten* by the abettment and command of a man, the commander is guilty of trespass: *so in the case here*, when he shall procure the servant to depart and retains him with him, he seems guilty of trespass." But *Hill* answers him: "Sir, in your case there is no marvel, because the principal actor in your case is guilty of trespass: but the case at bar is different; for the procurement only is not a trespass against the peace, nor is the departure of the servant a trespass against the peace; then, if the cause of action is not against the peace, the remainder which follows after it is not trespass against the peace: and I well agree that the defendant in this case is guilty, *as of a thing done against the provisions of the statute; and this matter is as clearly within the statute as it could be, both as to the servant, who has departed from his service, and as to the defendant, who has presumed to retain him in his service against the statute.* *Hankford*: I am of the same opinion, as my master has expressed, that, if my servant depart out of my service, at common law I have no action, and the cause was for that between my servant and me the contract sounds in the manner of a covenant in itself (*en luy meme*), upon which no action was given at the common law without a specialty; and for this mischief was the statute ordained and action given on it; wherefore, if you will not say that *he took* your servant out of your service, as you have supposed by your writ, this writ is not maintainable." *Culpeper* says: "if a man procure my ward to go from me, and he goes by his procurement, I shall have ravishment of ward against him." *Hankford* admits this, and says: the reason is, because the ward "is a *chattel* and vests in him who has the right." After some more discussion, *Skrene* amends, and says: "he came to our house, and procured our

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servant, and *took him*, as we have supposed by our writ."

And *Tremain*, being ordered to answer, pleads: "he was wandering, and offered his service to us; and we received him: without this that we *took him* in manner as he has alleged." And upon this, in the end, they seem to have gone to the country. There were several points in this case: and it is not clear whether on this part the Court was ultimately divided or not: but it is clear that the judges who argued in support of the count as first pleaded contended only that it shewed a trespass.

Thirning admits that, before the statute, if a servant *went* out of the service no action lay, but if he was *taken* trespass did; and then contends that the *procuring* in the case at bar was a taking and made the party guilty of trespass; in which he was clearly wrong. Now, if at this time case lay at common law for procuring the servant to depart, what becomes of the argument of the necessity for the statute. Or if, where one party broke a covenant at the instigation of another, case lay, why was not that applicable to the case of a covenanted servant. But it is clear that all agreed in this: if the defendant has taken the servant under such circumstances, you may have trespass at common law now as before the statute; but, if you cannot lay it as a trespass, your only remedy is under the statute. I may as well add *Fitzherbert's Abridgement* (tit. *Laborers*, pl. 16.), which is fuller, and I think more accurate, than *Brooke's*. "Trespass at common law of his servant taken out of his service with force. *Tremain*: We found him vagrant in a certain place in another county, and there he came and proffered his service to us, and made covenant with us to serve. Judgment if action &c. *Skrene*: He was retained with us to serve us in the office of a bergier for a year,

within which the defendant *procured* him to go out of our service; by reason of which he *went* out of our service within the year and hired himself with the defendant.

Hill: This action does not lie on the matter. *Skrene*:

If a man *procure* my servant to go out of my service, and retains him, he does me wrong. *Hill* and *Hankford*:

That is true; but you shall not have remedy on such a writ as this is. *Culpeper*: The action which was at

common law is not taken away by the Statute of Labourers. *Thirning*: At common law, before the

statute, if my servant *went* out of my service, no action was given me; but, if a man *took* him out of my service,

an action was given at the common law, and still is; and, if I am beaten by the command of another, the commander is a trespasser. *Hill*: The procurement only

is not trespass against the peace, nor the departure of the servant: then, if the cause of the action is not

against the peace, the remnant, to wit the retainer, cannot be: but this case here is openly *within the statute*,

as it may be against the servant upon the departure, and against the master upon the retainer. *Hankford* and

Hill (a): There was no action at the common law upon the departure, because the contract between the servant

and me sounds in covenant in a manner; and for that mischief was the statute made; wherefore, if you will

not say that he *took* your servant, this action does not lie. Whereupon the plaintiff said that the defendant

procured his servant &c. and *took* him: and the other side traversed this: *et alii e contra*." But, says *Fitzherbert*,

it seems that the defendant should have traversed the taking at first in his plea in bar. In a case (b) in *Yearb.*

Mich. 47 E. 3. fol. 14. A. pl. 15., which was, on the Statute

(a) Qc. "as *Hill* has said?"

(b) A. D. 1373.

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of Labourers, against a servant for departing within the term for which he was retained, the plea was "we were never in *your service*;" and the question was whether that was good without a traverse of the retainer; and *Finchden* (a) said this, which was agreed to by the whole Court: "At common law, before the statute, if a man took my servant out of my service, I should have writ of trespass there, where he was in my service bodily: now the statute was made for this mischief, that if he never comes into my service, after he has made covenant to serve me, but he eloignes himself from me, I shall have such writ and suggest that he was retained in my service and departed, as here is: wherefore it is necessary to traverse the retainer;" which accordingly was done by the defendant, issue taken, and sic ad patriam.

Any one, I am certain, who will go through the cases abstracted by *Fitzherbert* under the title *Laborers*, will be satisfied that at common law, before the Statute, such an action as the present could not be maintained. Under that title 61 cases are abridged: many of them are for the seduction of servants; but there is no instance of any one in which the action at common law was sustained, unless an actual trespass was charged: and it is clear, from the case which I have cited at so much length, that the distinction between taking and procuring to go was familiar to the lawyers of that day. I can hardly imagine that this could have been said, if the common law would have given relief in such a case: and, if it could, the rapid growth of the action after the Statute of Labourers had passed would be difficult to account for.

I come then to the Statute of Labourers (23 *Ed.* 3);

(a) *William de Finchden*, Chief Justice of the Common Pleas; April 14, 1372.

and my object now is to shew that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case ; and that the older authorities are decidedly against it. As we learn from the preamble, it was enacted in consequence of the great mortality among the lower classes, especially workmen and servants, in a pestilence which had prevailed in 1348-9. This pestilence will be found mentioned in our historians. And in the preamble it is said: "Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommodities, which of the lack *especially of ploughmen and such labourers* may hereafter come, have" &c. "ordained." This preamble is followed by an enactment, that every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into service when required on customary wages. By the second section it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on; and no one is to *receive or retain* such offender in his service under like pain of imprisonment. This ordinance is the foundation of the action for the seduction of a hired servant. Upon reference to *Fitzherbert, Natura Brevium*, 167 B, it will be seen that the writ in such an action always recited the statute. Now it will be observed that, in order to bring a person within the first section, he must have been one

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who was not living by merchandise, nor having any certain craft, “certum habens artificium,” nor having of his own wherewith to live, “habens de suo proprio unde vivere possit,” or land of his own in the culture of which he can occupy himself: and these limitations are more pointed by the second chapter, which speaks of “messor falcator aut alius operator vel serviens.” Looking at these words, and the language of the preamble, it is clear that mechanics and labourers in husbandry were the principal objects of the statute: and the decisions were accordingly. *Fitzherbert* (*Natura Brevium*, 168 E) says: “And so a gentleman by his *covenant* shall be bound to serve, although he were not compellable to serve. For if a gentleman, or chaplain, or carpenter, or such which should not be compelled to serve, &c. covenant to serve, they shall be bound *by their covenant*, and an action will lie against them for departing from their service.” And Lord *Hale* in a note refers to *Yearb. Mich.* 10 H. 6. (a) fol. 8 B. pl. 30., as shewing that a writ does not lie on the statute for the departure of a chaplain who is retained to say the mass. Several cases will be found earlier in the Year Books to the same effect. In *Yearb. Trin.* 50 E. 3. (b) fol. 13 A. pl. 3. is a case in which the parson of *B.* sued *Thomas F.*, a chaplain, on the Statute of Labourers, and counted of a covenant made with him to serve in the office of seneschal, and to be his parochial chaplain for a certain term, and complained of a departure within the term. As to the office of seneschal, the defendant traversed the covenant; and, as to the residue, contended that the statute was only made for labourers and artificers, and he was neither the one nor the other, but the servant of God, and so was not bound by the statute. *Clopton*, for the plaintiffs, took a distinction between a

(a) A. D. 1431.

(b) A. D. 1376.

parochial and a private chaplain, contending that the former, from the variety and daily pressure of his duties, was in many respects to be regarded as a labourer; and within the Statute "as any other person of the people" (an early authority by the way for the modern distinction of the working clergy) (a). The case was adjourned, and the Judges of the King's Bench were consulted: and the decision was that a chaplain was not bound by the statute; and as to that part of the writ he was discharged. The same law will be found in *Yearb. Mich.* 4 H. 4. (b) fol 2 B. pl. 7, where the count on the statute, against a chaplain, was that he was retained by the plaintiff to be

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(a) This part of the case is as follows.

Henimer [counsel]: And as to what he has surmised: that we made covenant with him to be parochial chaplain, and that we departed out of his service: we apprehend that the statute was not to any other intent than as to those who are labourers artificers; and this is neither one nor other, but the servant of God; so he is not bound by the statute: so we apprehend not that this action lies against us; for every one of the other sorts of servants (chescun auter servant), if he be in health and bodily power, he is bound to do his service, and his work from day to day; but the Chaplain is not bound to sing every day, if he will not, for divers causes which lie in his conscience (i. e. to judge of the sufficiency of which causes is left to his conscience): and so he may cease to sing for one day or two, so that he is in quite a different degree from a labourer or artificer.

Clapton [counsel]: This man, who is his parochial chaplain, may more readily be adjudged a labourer than another chaplain who is to serve only as private priest (ou parson singuler). For a parochial priest has many other things to do besides to sing the mass and other divine services; for it behoves him to visit the sick of the parish in their houses, to administer to them the rights of Holy Church, and so it behoves that Parsons of the Holy Church should have their needful assistance, for they cannot do it themselves. Wherefore it seems in divers respects that he is as much within the statute as any other person of the people. *Balknap* [*Robert Balknap*, Chief Justice of Common Pleas, October 10, 1375.]: This was a case and the matter was adjourned, in the other term, till now: and it is our opinion, and that of our fellows of the King's Bench also, that he is not bound by the statute as another person is: wherefore as to this point we dismiss you; and, as to the remainder on which you are at issue, keep your day &c.

(b) A. D. 1402.

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his chaplain, and also his proctor, and collector of tithes, and to serve him "as pees et as maines" for a certain time. The retainer to be proctor and collector was specially traversed: and it was pleaded that his retainer as chaplain was only to do divine service. The decision is not very clearly stated: but *Fitzherbert* (*Abridgement* tit. *Laborers*, pl. 51) appears to have understood that it was against the defendant; for he abstracts the case very shortly, and adds: "quod mirum, for he shall not be compelled to serve, but the statute is in *servitio congruo*." Immediately after this he abstracts *Pasch.* 12 H. 6. (a) thus—"Action on the Statute of Labourers is not maintainable against an esquire." And in *Yearb. Hil.* 19 H. 6. fol. 53 B. pl. 15. (b) is a case on the Statute, where the count charged a retainer in the office of labourer; and the plea was: he retained us to collect his rents in a certain place, without this that we were retained with him in the office of labourer. *Newton* (c) says: "he cannot be required to serve him in the office of collecting his rents, nor to be his seneschal; which proves that he cannot be punished by this action; for this action lies only against those who can be required to serve the party as a labourer." And then, by the advice of all, the issue was held well tendered.

I am tempted to add one case more from *Yearb. Mich.* 10 H. 6. (d) fol. 8 B. pl. 30. The Prior of *W.* brings writ on the Statute of Labourers against a chaplain, and counts that he was retained in his service with him for a year to do divine service, and that he departed within the year &c. Defendant's counsel demands judgment

(a) A. D. 1434. There is no *Yearbook* of this term.

(b) A. D. 1441.

(c) *Richard Newton*, Justice of Common Pleas; 3d November 1439.

(d) A. D. 1431.

of the writ: "for you see well how he brings this action against a chaplain upon the Statute of Labourers; and the statute is only to be understood against Labourers in Husbandry. *Strange (a)*: The writ is not maintainable by the statute; for you cannot compel a chaplain to sing in mass; for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute. *Cottesmore (b)*: To the same intent; for it was not made but for labourers in husbandry: as in case of a knight, an esquire, or gentleman, you cannot compel them to be in your service by the statute, for that the statute is not to be understood but of labourers, who are vagrant, and have nothing whereby to live; these shall be compelled to be in service; but a chaplain hath whereof he may live in common understanding as a gentleman:" wherefore the writ is abated, by the whole Court. *Brooke (Abridgement, fol. 57. tit. Laborers, pl. 47)*, abstracting this, gives, as the reason of the judgment, "for it is to be understood that he hath whereof he may live, and is not always disposed to celebrate divine service." It will be observed that many of these cases are with respect to chaplains: in one of them it is said that a chaplain is the servant of God; in another that the service for which the retainer is alleged must be a service congruous to his condition. At this distance of time, it may be difficult, without more inquiry into history, to assign a reason why there should be such a majority of cases relating to chaplains. It must be referable of course to some circumstances in the state of society at those periods. It may be collected, from a

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(a) *James Strangeways, Justice of the Common Pleas; February 6, 1426.*

(b) *John Cottesmore, Justice of the Common Pleas; 15 October 1430: afterwards, in 1439 (17 H. 6.), Chief Justice of the Common Pleas.*

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royal mandate to the Archbishops and Bishops, that the services of stipendiary chaplains were at the date of the statute much in request; the Bishops are required to enforce their serving for their accustomed salary under pain of suspension and interdict. This mandate is printed in the Statutes at Large at the end of the statute: but none of the cases refer to it. But it is clear that the Courts were not laying down any rule of law applicable to chaplains only. They are repeatedly put in the same category with knights, squires, gentlemen, all who must be understood to have means of living of their own. The Courts construed the statute, and as it seems to me quite correctly. They said: if any of these covenants to serve, he will be bound by his covenant, and an action will lie at common law for the breach; but, if you rely on the compulsion of the statute, such persons are not within it. These authorities, of a date when the statute must have been well understood, might be multiplied: and, whatever may be said of the uncertainty and often conflicting nature of decisions from the Year Books, and, however we may now smile at some of the reasonings of the Judges, probably not without their weight when uttered, they seem to me satisfactorily to establish the principle, that actions framed on the statute were governed by a consideration of the object and language of the statute, and that these pointed only to the compulsion of labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse. If this be so, I apprehend it is quite clear that *Johanna Wagner* could not have been compelled, while the statute was unrepealed, to serve the plaintiff in any of the capacities stated in this declaration. Nor, I think, can

it be successfully contended that we may not take judicial cognisance of the nature of the service spoken of in the declaration. Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the Year Books the Judges reasoning about the ability of knights, esquires and gentlemen to maintain themselves without wages: distinguishing between private chaplains and parochial chaplains from the nature of their employments: and in later days we have ventured to take judicial cognisance of the moral qualities of *Robinson Crusoe's* "man *Friday*" (a) and *Esop's* "frozen snake" (b). We may certainly therefore take upon ourselves to pronounce that a singer at operas, or a dramatic artiste to the owner and manager of Her Majesty's theatre, is not a messor, falcator, aut alius operarius vel serviens, within either the letter or the spirit of the Statute of Labourers. And, if we were to hold to the contrary, as to the profession of *Garrick* and *Siddons*, we could not refuse to hold the same with regard to the sister arts of Painting, Sculpture and Architecture. We must lay it down that *Reynolds* when he agreed to paint a picture, or *Flaxman* when he agreed to model a statue, had entered into a contract of service, and stood in the relation of servant to him with whom he had made the agreement. But here we are not without authority. In *Taylor v. Neri* (c), where the declaration in case stated that the plaintiff, being manager of the Opera House, had engaged

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(a) See *Forbes v. King*, 1 Dowd. P. C. 672.(b) See *Hoare v. Silverlock*, 12 Q. B. 624.(c) 1 *Exp. N. P. C.* 386.

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one *Breda* as a public singer during the season at a salary, that the defendant had assaulted and beaten *Breda*, by which plaintiff lost his service as a public performer, *Eyre* C. J. nonsuited the plaintiff, saying the record stated *Breda* was a servant hired to sing, and he was of opinion he was not a servant at all. It seems to me that this is the language of common sense; and no case has been cited which conflicts with it. But, if *Johanna Wagner* be not within the statute, and could only have been sued, as at common law, upon her contract for the breach of it, it will follow, I conceive, that the present action could not have been maintained against the defendant while the statute was in force, and of course cannot now, if, as I contend, the action arises from and is limited by the purview of the statute. Under the statute the one depended on the other: if a party sued on the second branch of the second section, he was bound to shew the servant, received or retained wrongfully, was such a one as was spoken of in the first branch; for so were the words, *talem in servitio suo recipere vel retinere presumat*. In the action accordingly against the seducer, the condition of the servant seduced, and the character of the service, were always material; if not stated in the count, the defendant introduced them in his plea, where they were such as were thought to take the servant out of the statute.

I conclude then that this action cannot be maintained, because: 1st. Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable; 2d. That the law with regard to seduction of servants from their masters' employ, in breach of their contract, is an ex-

ception, the origin of which is known, and that that exception does not reach the case of a theatrical performer.

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I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law. In my opinion it is not open to this objection. It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law.

I think, therefore, with the greatest and most real deference for the opinions of my Brethren, and with all the doubt as to the correctness of my own which those opinions, added to the novelty and difficulty of the case itself, cannot but occasion, that our judgment ought to be for the defendant: though it must be pronounced for the plaintiff.

Judgment for plaintiff.

The defendant had obtained leave to plead, as well as demur.

Creasy, on a subsequent day (*June 6th*), moved, on behalf of the defendant, for a rule to shew cause why the trial of the issues in fact should not be postponed till the issue in law was finally disposed of in a Court of

1853. Error. He referred to stat. 15 & 16 *Vict. c. 76. s. 80.*

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[Lord *Campbell* C. J. The meaning of sect. 80 is that it shall be in the discretion of the Court to direct which issue shall be first disposed of in that Court. The issue in law has been, as far as this Court is concerned, finally disposed of by the judgment on the demurrer. *Crompton J.* Sect. 80 was framed to meet a point which might have been raised on the practice, when there were issues of law and fact, to leave to the plaintiff to determine which should be disposed of first. There is a note on that subject in *Williams's Saunders* (a). But it would be very strong if we were to construe the words in sect. 80 so as to give a writ of error before the whole of the issues were finally disposed of in this Court.]

Per CURIAM (b). There will be no rule.

Rule refused.

(a) See note (3) to *The Dean and Chapter of Windsor v. Gover*, 2 *Wms. Saund.* 300.

(b) Lord *Campbell* C. J., *Erle* and *Crompton* Js.

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WILLIAM DAVIES *against* GEORGE CHARLES
FLETCHER, WILLIAM PRITCHARD and FRE-
DERICK KEENE.

Tuesday,
May 24th.

ACTION for false imprisonment. Plea: Not Guilty,
by statute. Issue thereon.

On the trial, before *Coleridge J.*, at the last Surrey Assizes, it appeared that the defendant *Fletcher* was clerk of the county court of Surrey, holden at *South-wark*, the defendant *Pritchard* was the high bailiff of the same court, and the defendant *Keene* one of the bailiffs. *Davies*, the plaintiff in this action, was sued in that county court by two persons named *Sumfield* and *Jones*; and the judge, on 1st *April* 1852, made an order, in that plaint, that *Sumfield* and *Jones* should recover 2*l.* 2*s.* 1*d.*, and that *Davies*, the now plaintiff, should pay that sum on 8th *April* 1852. Default was made in the payment. Execution against *Davies's* goods issued; and there was a return of *Nulla bona*. A judgment summons issued in the plaint, on 28th *May* 1852, calling on *Davies* to appear on 21st *June* 1852 in the county court. *Davies* was served with it, but did not appear. The judge of the county court, on affidavit of service, made an order that, for not appearing, he should be committed for seven days. In pursuance of

S. sued *D.* in the county court, and recovered. *D.* did not pay the amount adjudged against him. A judgment summons issued against *D.* who did not appear as required by it, and the judge ordered him to be committed for seven days. A warrant issued to arrest him. Then *D.* paid *S.*, the plaintiff in the plaint, the amount of debt and costs, and *S.* wrote to *F.*, the clerk of the county court, to say he was paid. Afterwards *D.* was arrested under the warrant, and detained for a few minutes till *F.*, the clerk of the county

court, who had forgotten the receipt of the notice from *S.*, found that notice and ordered his discharge. *D.* brought an action for the imprisonment against *F.* and the bailiff.

Held, that payment to the party, after the warrant issued, did not operate as a supersedeas, and that the arrest and detention were both justified.

Semble, that the discharge of the prisoner, after the letter from the party was found, was irregular.

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that order a warrant, under the seal of the county court, issued, entitled in the plaint. It was addressed to the high bailiff and bailiffs of the county court and the keeper of *Horsemonger Gaol, Surrey*; and, after reciting all the previous proceedings, concluded thus: "And whereas it was duly proved, upon oath, at the said last mentioned court, that the said defendant was personally served with the said summons; and whereas the defendant did not attend as required by such summons, or allege any sufficient excuse for not so attending; and thereupon it was ordered by the judge of the said court that the defendant should be committed for the term of seven days to the common gaol aforesaid, according to the form of the statute in such case made and provided, or until he should be discharged by due course of law: These are therefore to require you, the said high bailiff and bailiffs, to take the defendant, and to deliver him to the keeper of the said gaol; and you the said keeper are hereby required to receive the defendant, and him safely to keep in the said gaol for the term of seven days from the arrest under this warrant, or until he shall be sooner discharged by due course of law. For which this shall be your sufficient warrant." The amount of the debt and costs were indorsed on the warrant. *Davies*, the now plaintiff, after the warrant had issued, on 28th June 1852, caused his clerk to pay *Sumfield* and *Jones*, the plaintiffs in the plaint, the whole amount. On 12th July 1852, the defendant *Keene*, who held the warrant as bailiff, arrested *Davies*, the now plaintiff, in the immediate neighbourhood of the office of the county court. As he maintained that the debt was discharged, the bailiff, at his request, took him into the office where the defendant *Fletcher* was. The plaintiff appealed to

Fletcher, and shewed him a letter from plaintiff's clerk, to the effect that the debt had been paid by the writer to the plaintiffs in the plaint. *Fletcher* said that he could not act upon that, and that "the officer must do his duty." In a few minutes it was discovered that the plaintiffs in the plaint had previously written to *Fletcher*, as clerk of the county court, to inform him that the debt was paid. On finding this letter, *Fletcher* desired the bailiffs to discharge the plaintiff; which was done. At the trial, the plaintiff relied on the expression used by *Fletcher*, that the bailiff must do his duty, as evidence that *Fletcher* was a party to the detention subsequent to that expression; and he contended that, as *Fletcher* had previous notice that the debt had been paid, such detention was illegal on his part. It was taken as a fact that *Fletcher* had notice from the plaintiffs in the plaint that the debt had been paid, and had bonâ fide forgotten it. The jury assessed the damages at one farthing; and the learned Judge directed a verdict for the defendants, with leave to move to enter a verdict for that amount.

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Pearson, in last Term, obtained a rule Nisi accordingly.

Montague Chambers and *Lush* now shewed cause. The warrant is a complete justification of the imprisonment. It was issued by a court of competent jurisdiction; for it cannot be disputed that, under stat. 9 & 10 Vict. c. 95. s. 99., the judge of the county court had power to order the committal of the now plaintiff: and it is also clear that all the previous proceedings were good both in substance and in form. But it is said that the subsequent payment to the plaintiffs in the plaint rendered the arrest under this warrant illegal. Even if it

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did do so, it could not affect the two bailiffs, who had no notice of the payment, and were bound to obey the warrant. And the defendant *Fletcher* was no party to the arrest: the utmost that can be imputed to him is that he did not act so promptly in interfering to set the plaintiff free as he might have done. [*Coleridge J.* The defendant *Fletcher* said that "the officer must do his duty;" and the plaintiff was detained in custody a few minutes after that. The action was a very ungracious one: but, if the imprisonment was wrongful in consequence of the previous payment of the debt to the plaintiffs in the plaint, there was evidence that *Fletcher*, who had had notice of that payment, was a party to the detention.] The payment of debt and costs to the plaintiffs in a plaint in the county court is no supersedeas of a warrant of commitment under stat. 9 & 10 *Vict. c. 95. s. 99*. The imprisonment, under such a warrant, is in the nature of a punishment for fraud, or for contempt in not appearing, not of execution. That is shewn by sect. 103, which enacts that it shall not operate as satisfaction of the debt, and also by sect. 110, which provides that, after payment of the debt and costs into court, the prisoner is to be discharged, not as a matter of course, as he would be if it were merely imprisonment in execution, but "by leave of the judge of the court in which the order of imprisonment was made." This contrasts with the execution against goods, which, being merely execution, is, by sect. 109, superseded on payment. [*Erle J.* Only on payment to the clerk or bailiff. Payment to the party to the plaint is not mentioned in sect. 109. Lord *Campbell C. J.* Sect. 110 in terms applies to a person actually in custody, who may be discharged by leave of the Judge on a certificate of payment. The case of payment, after the

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warrant has issued but before the arrest, does not seem provided for by the statute.] It may be that it was intended that a person guilty of a fraud, or a contempt, should never be discharged without an application to the court: the latter part of sect. 110 indicates this. The case is provided for by the rules of practice made under the authority of stat. 12 & 13 *Vict. c. 101. s. 12*. The 133d rule (a) is: "Where an order is made for commitment for non-payment of money, the defendant may, at any time before his body is delivered to the custody of the gaoler, pay to the bailiff the total amount indorsed on the warrant, and on receiving such amount, the bailiff shall discharge the defendant out of custody, and shall within twenty four hours from receiving the same, pay over the amount of the judgment and costs to the clerk." Here the commitment is for contempt in not appearing: but, even supposing it to be a commitment for not paying money, so that rule 133 applied, that rule requires the discharge of the prisoner on his making payment to the bailiff, an officer of the court; it does not require or indeed authorise the clerk of the county court to order his discharge on account of payment to the plaintiff in the plaint.

Pearson, in support of the rule. The real question is, Whether the warrant was in the nature of process in execution, or in poenam? Sect. 99 of stat. 9 & 10 *Vict. c. 95*. authorises commitment by way of punishment for frauds: and, had this been a commitment for a fraud, the defendant's argument would have been good. But sect. 99 also authorises commitments resembling an attachment for not paying costs, which is merely a civil execution;

(a) See *Pollock's Practice of the County Courts*, App. 89.

1853. *Bonafous v. Schoole* (a). [Coleridge J. In *Kinning's Case* (b) the commitment was for not paying an instalment; and it was very much discussed whether the party ought to have been heard before he was committed, or whether it was merely a commitment in execution.] Payment to the plaintiff in the plaint is good: the directions to pay to the officer of the court are directory, and for the benefit of the defendant if he chooses to adopt that mode of payment; *Regina v. Fletcher* (c).

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Lord CAMPBELL C. J. I am of opinion that my brother Coleridge properly directed a verdict for the defendants; and, therefore, that this rule must be discharged. Stat. 9 & 10 Vict. c. 95. s. 99. enacts "that if the party so summoned shall not attend as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn," and then the enactment enumerates several other acts of misconduct, and proceeds, "it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed" "for any period not exceeding forty days." Now not appearing as required by the summons is by this enactment placed in the same category with the other acts of misconduct: and, if any one of those acts be committed, the commitment is lawful. Here there was a judgment against the now plaintiff, and a summons; and the now plaintiff did not attend as required. The warrant recites these proceedings, and that "it was ordered by the judge of the said court that the defendant," the now plaintiff, "should

(a) 4 T. R. 316.

(b) 10 Q. B. 730. See also *Ex parte Kinning*, 4 Com. B. 507.

(c) Post, p. 279.

be committed for the term of seven days," "or until he should be discharged by due course of law." And the mandatory part requires the bailiff to arrest him. I am of opinion that the warrant remained in full force at the time of the arrest. What is it that suspended the operation of the warrant? Certainly nothing to which rule 133 can apply; for it is not pretended there was any payment to the bailiff. There had been payment to the party to the plaint; but that payment did not purge the contempt in not appearing. I think, therefore, that the arrest was right; and the only mode provided in stat. 9 & 10 *Vict. c. 95.* for the discharge of a person rightfully arrested is in sect. 110. That mode was not pursued in this case: and I have great doubt whether the discharge of the now plaintiff, at last, by order of the clerk, was lawful; but certainly the previous arrest and detention were not illegal. Such a commitment as the present is very different from an execution, or an attachment for not paying money.

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COLERIDGE J. concurred.

ERLE J. I am of the same opinion. All the proceedings were, it is admitted, regular until after the warrant issued under sect. 99. The nature of that warrant has been very much discussed in *Westminster Hall* (a); but, whether it be in pœnam, or in satisfaction, or partly in pœnam and partly in satisfaction, I am of opinion that it remained in full force at the time of the arrest. It appears that the now plaintiff had before his arrest paid the plaintiffs in the plaint, and that a

(a) See *Kinning's Case*, 10 Q. B. 730; *Ex parte Kinning*, 4 Com. B. 507.

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letter had been received by the clerk of the county court, purporting to be from the plaintiffs in the plaint, informing him of such payment. Did that make the arrest by the bailiff illegal on their part? Certainly it did not. The knowledge of *Fletcher* was not knowledge of the bailiffs. But, at *Davies's* request, he was taken before *Fletcher*; and he, having mislaid the letter from the party in the plaint, at first refused to interfere, and said that the officer must do his duty. Now I am of opinion that, if *Fletcher* had at that time had the letter from the party in his hand, he would have been justified in refusing to interfere. Sect. 110 says that after payment the party may be discharged by leave of the judge. Rule 133 says that, after payment to the bailiff, the bailiff may discharge the party: but in the present case neither was there leave of the judge nor had there been payment to the bailiff. I am clearly of opinion that the letter from the plaintiff in the plaint to the clerk was not equivalent to a direction from the plaintiff in a cause to the sheriff not to execute a *capias*. Rule 133 authorises a discharge by the bailiff when he himself has received payment: but it never was intended to throw upon either clerk or bailiff the burthen of ascertaining at their peril the genuineness of a letter purporting to come from the party. *Regina v. Fletcher (a)* was as to the effect of payment to the party before the warrant issued; which is quite a different question.

CROMPTON J. concurred.

Rule discharged.

(a) Post, p. 279.

[1852.]

The case of *Regina v. Fletcher*, referred to in the preceding report, is here added.

[Friday,
May 7th,
1852.]

The QUEEN against FLETCHER.

COLLIER, in last *Hilary* term, obtained a rule nisi for a mandamus calling upon the clerk of the county court of *Surrey* holden at *Southwark* to issue process of execution for costs in a plaint by the overseers of the parish of *Christchurch, Surrey*, against *John Gore*. The plaintiffs had obtained an order of the county court in the said cause that they should recover against the defendant 34*l.* 10*s.* 10*d.* debt, and 5*l.* 7*s.* 2*d.* costs, making together 39*l.* 18*s.*: and the order directed that the defendant should pay the same to the clerk of the said court, at his office at the court-house, on or before 13th *October* 1851. The attorney for the plaintiffs, in his affidavit in support of the present application, deposed that, "since the making of the order, this deponent received, on behalf of the said overseers, as their solicitor as aforesaid, from the said *John Gore*, the said sum of 34*l.* 10*s.* 10*d.*, being the debt in the said action, leaving the said sum of 5*l.* 7*s.* 2*d.*, so due for and in respect of costs as aforesaid, still remaining unpaid: that that sum had not yet been paid: that the deponent had requested the clerk to issue a warrant of execution to levy the last mentioned sum on the defendant's goods, but that he had refused; and the judge of the court had also, on application, refused to order the clerk to issue such warrant."

If a plaintiff in the county court, having obtained judgment for debt and costs, receives payment of the debt only, he may, under stat. 9 & 10 *Vict. c. 95. s. 94.*, require the clerk of the county court to issue execution against the debtor's goods for the costs only: although the judge's order in the cause directed that payment should be made to the clerk at the court-house, and the debt was not paid there or to the clerk at any place. A mandamus to issue execution in such case is properly directed to the clerk, not to the judge.

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The clerk of the county court made affidavit in answer, referring to the statutes 9 & 10 *Vict. c. 95.*, 12 & 13 *Vict. c. 101.*, and 13 & 14 *Vict. c. 61.*, the Orders of the Secretary of State, and the Rules, Orders and Regulations sanctioned by three Judges (*a*) by which the said court (as well as the other county courts) is governed: and he stated that, under these statutes, &c., certain forms of judgments and adjudications and orders, and of writs and warrants of execution, are authorised, and certain fees are directed to be taken in respect of the said writs or warrants of execution on any adjudication or order made in the said court, and certain provisions are made respecting the same: and it is thereby provided that the judge of the said court may make orders concerning the time and times any debt, damages or costs for which judgment has been obtained in the said court shall be paid; and all such moneys are to be paid into the said court unless the said judge shall otherwise direct: that, upon such moneys being paid into the said court, or being taken out of the said court respectively, certain fees are provided to become payable, namely, 1*d.* upon each payment not exceeding 10*s.*, and 2*d.* in the pound on the amount of the payment on each payment above 10*s.*: and the fees payable in respect of the payment into court of 39*l.* 18*s.* in a case &c. (explaining the mode of calculation as to poundage, fractions, &c.) would amount to 3*s.* 4*d.* for paying the same into, and a like sum of 3*s.* 4*d.* for paying the same out of, court: and a fee of 2*d.* in the pound is also made payable for issuing a warrant of execution: and, under the circumstances above mentioned, the fee payable in

(*a*) *Pollock's Practice of the County Courts*, App. p. 74.

respect of a warrant of execution for the said 39*l.* 18*s.* (independent of the high bailiff's fees for the execution of the same) would amount to the like sum of 3*s.* 4*d.*: which fees this deponent, as such clerk as aforesaid, is bound to demand and take, and also to enter and register the same, and to pay over the same, after making certain deductions therefrom, to the treasurer appointed &c. under the said statutes, whenever the Lords Commissioners of the Treasury shall direct; and which fees, on 39*l.* 18*s.*, amount in the whole to 10*s.* (exclusive of the high bailiff's fees); whereas the fees payable under the same circumstances in respect of a sum of 5*l.* 7*s.* 2*d.* could amount to 3*s.* only.

The affidavit also set out the order of the judge of the county court, by which it was "adjudged that the plaintiffs do recover against the defendant" &c. (debt and costs as above stated, p. 279); and it was "ordered that the defendant do pay the same to the clerk of the court at his office at the court-house" &c. (*Swan Street, Newington*), "on or before the 13th day of *October* 1851." "In addition to the above payment, the fee of 3*s.* 4*d.* for paying the money into court." And the deponent stated that neither the said 39*l.* 18*s.* nor any part thereof had been paid in pursuance of the order to him at his office; nor had he received, on the money payable under the said adjudication, the fee required, under the statutes, rules &c., to be paid in respect of money paid into or out of court. That the attorney for the plaintiffs had nevertheless required the deponent to issue a *fi. fa.* under the seal of the court to levy 5*l.* 7*s.* 2*d.*, the costs of the suit; and that he did not, at the time of making such application, offer to pay the fees: and "that this deponent did not

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think himself authorised to issue execution in a form or for a sum different from that directed by the adjudication and order of the said judge, or to accept and receive other fees than those legally payable upon the" said adjudication and order. And that, although the judge did not give reasons in detail for refusing to order a *fi. fa.*, he did state, in substance, that his compliance with the application would have the effect of abolishing the system and rules and practice of the county courts, as established in such matters.

Brambell and *C. Clark* now shewed cause. The whole process of the county court is created by statute, and must conform to it. The course of execution against goods or body is directed by sects. 94, 109, 110, of stat. 9 & 10 *Vict. c. 95*. Nothing is said in the Act as to partial execution, except so far as it is warranted by sects. 92, 95. The intention of the Legislature has been that these courts should be self-supporting; for that purpose the fees on the amount of debt levied by their process are important; and it is necessary that the moneys raised should come into the hands of their officer. The statute introduces him as the person into whose hands the debt recovered is to be paid; and, for the proportionate fees which he receives, he is accountable to the Commissioners of the Treasury, by stat. 12 & 13 *Vict. c. 101. s. 7*. Those fees are now specifically applicable to various public purposes, and are public property. By stat. 9 & 10 *Vict. c. 95. s. 94.*, whenever an order for payment of money has been made by the Judge, if default be made in payment "at the time or times and in the manner thereby directed," the amount shall be recoverable by execution against the goods, and

the clerk, at the plaintiff's request, shall issue a fi. fa. to levy "such sum of money as shall be so ordered," and also the costs of execution. The time and manner of payment are not subject to alteration except in one instance, under sect. 100, when the defendant has been summoned before the Court under sect. 98. It would be difficult, in a case like the present, for the plaintiff's attorney to fill up the form of writ. Could he insert that part of the debt has been recovered, and the bailiff is to levy the rest? [Lord Campbell C. J. Would the proceeding be anything more than the issuing a fi. fa. or ca. sa. from a superior Court, when part of the debt had been paid?] The writ ought to agree with the judgment: if it do not, and the reason of the variance be not shewn by the writ itself, the process is bad; *Webber v. Hutchins* (a). There are no means here of making an authentic entry which would estop the plaintiff from suing again. [Lord Campbell C. J. The insertion of 5*l.* 7*s.* 2*d.* in the warrant would be conclusive evidence against him that no more was due to him at the time from the defendant in this cause. *Wightman* J. An order of the court would appear. What danger do you say would result from the making of such an order as this plaintiff applies for?] The plaintiff might afterwards deny that he had instructed the clerk of the court to levy for the smaller amount; and, on these proceedings, the contrary would not appear. [*Wightman* J. If he applied to the clerk to levy the residue, the county court would not sanction the application, and this court would not enforce it.]

But, further, if a mandamus could issue in this case, it

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should be directed to the judge, not the clerk. [Lord *Campbell* C. J. The minister who is to do the ministerial office is the person to be commanded. If he ought to have done the act without a special mandate of the judge, is not he the party in default?] By sect. 94, the clerk, "at the request of the party prosecuting such order, shall issue under the seal of the court a writ of fieri facias as a warrant of execution to the high bailiff." The writ is the writ of the court; and the judge should be directed to issue it.

Brewer, *contra*. If the mandamus cannot issue in this case, there can be no execution against goods for the residue of a debt where part remains unpaid; but a summons under sect. 98 must always issue. This is not contemplated by the statutes. In the Schedule of Forms annexed to the Rules of Practice (a), the form for "Execution against the goods of defendant" provides for the case where "part of the said sum," ordered by the court to be paid, remains unpaid, and there is a direction as to poundage on the sum "remaining due." It is not suggested here that the 34*l.* 10*s.* 10*d.* has not been paid to the plaintiffs, though it is unpaid to the clerk. As to the second point, the clerk is the person directed by the statute to issue process of execution. There is nothing that the judge could do if a mandamus were directed to him. [Lord *Campbell* C. J. He would have to make an order on the clerk.] Then the judge must rehear. [*Wightman* J. Nothing remains for him to hear.]

Cur. adv. vult.

(a) *Pollock's Practice of the County Courts*, App. p. 111.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

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Upon this rule the question has been raised, whether a plaintiff who has recovered a judgment in the county court for debt and costs, and has received the debt out of court, is entitled to a writ of execution for the costs. For the defendant it was contended that, according to the statute and the form of the judgment, and the rules of practice in the county court, the whole of the sum recovered ought to be paid either into court or to an officer of the court, and that, if the plaintiff received any part himself, he lost the right to an execution for the residue. But we find nothing in the statute or the rules to support this view. Provisions are made in both for execution for the residue after part satisfaction: see section 95, and rules 120, 121 and 122 (a); and no provision is found prohibiting part satisfaction to a plaintiff without the intervention of the court. The order to the defendant, in the form of the judgment, to pay the money into court, is directory, and for the benefit of the defendant if he chooses that mode of payment.

The defendant further alleges that the Legislature intended to secure a sufficiency of fees for the support of the county courts, and that the bringing of all the money recovered into court is important for this purpose. But we think that there was not an intention to create useless costs. Plaintiffs generally in our Courts are entitled to prosecute, abandon or settle their suits as they may choose; and we see no reason for considering the county courts to stand in a different situation in this respect from the other tribunals of the country. It is

(a) *Follock's Practice of the County Courts*, App. pp. 87, 88.

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obvious that a plaintiff's power of settling with a defendant without an execution may be the means of saving expence. By so settling for part he does not, in our judgment, incur any incapacity in respect of an execution for the residue.

As the judge, when applied to, had declined to order the writ, we think that the rule against the clerk ought not to be drawn up if within a week he issues an execution as prayed: otherwise,

Rule absolute (a).

(a) The writ issued in the above case; and there was a return, to which there was a demurrer. On the demurrer coming on for argument, on 15th January, 1853, it was intimated that the case might be brought before a Court of Error. This Court (Lord Campbell C. J., Coleridge, Wightman and Crompton Js.) suggested that, as the Judges on the Bench adhered to the opinion expressed by the Court in making the rule absolute, it would be better to enter judgment for the Crown, without argument. This was acceded to; but the prosecutors afterwards abandoned their writ of error, and no further proceedings were taken on it.

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BATARD *against* HAWES.SAME *against* DOUGLAS.BATARD *v.* HAWES.

DECLARATION¹ for money paid. Pleas: 1. Except as to 72*l.* 19*s.* 6*d.*, Never indebted. 2. As to 72*l.* 19*s.* 6*d.*, payment into court. The plaintiff joined issue on the first plea, and took the money out of Court on the second.

On the trial, before *Crompton J.*, at the *Westminster* sittings in *Hilary* Term last, it appeared that the plaintiff, the defendant, and several other persons, were members of a provisional committee; and that an engineer of the name of *Baley* had been employed, in respect of the scheme, in 1847, by some of the members. *Baley* sued the plaintiff alone, and recovered from him 753*l.* 18*s.* 7*d.* which was paid by plaintiff in 1850. The action was for contribution. The plaintiff's case was that the members of the provisional committee, who had originally made themselves liable to Mr. *Baley*, were five and no more; viz. the plaintiff, the defendant, and three persons named *Schneider*, *Douglas* (defendant in the other cause) and *Hilliard*, all still alive. The plaintiff commenced actions against the four per-

Plaintiff, being a provisional committee-man, became with eleven others, including defendant, liable for a debt contracted in respect of the scheme. The creditor sued plaintiff, who ultimately paid the whole debt. Two of the original co-contractors died before the payment. Plaintiff sued defendant for contribution. Held:

1. That, though there might be many cross liabilities amongst the provisional committee-men, in respect of the scheme, an action lay, at law, for contribution against such of them as were liable to pay this debt, provisional committee-men not being partners.

2. That the plaintiff was entitled to recover only one twelfth of the debt; the liability of a cocontractor to one who has paid the entire debt being, at law, to contribute an aliquot part according to the number of persons originally liable, without reference to the number liable at law at the time of payment.

Semble: that an action would have lain at law, for contribution, against the representatives of the deceased cocontractors.

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sons who, according to his case, were jointly liable with him, claiming from each one fifth of the amount which he alone had paid to *Baley*. *Schneider*, before the trial of this action, compromised the action against him by paying 100*l*. The other two actions were still pending. The defendant's case was that the original employers of Mr. *Baley* were more than the five persons above named. There was evidence which left it somewhat in doubt how many cocontractors there were: the jury found, and it was not disputed that on the evidence they were justified in finding, that the original employers consisted of the plaintiff, the four persons whom he sued, and also seven other members of the provisional committee, of whom two died after the debt was contracted, but before the plaintiff's payment in 1850. On this finding, the plaintiff's counsel contended that the plaintiff was entitled to one tenth part of the debt, as the number of persons liable at law to *Baley* at the time the payment was made was ten. A tenth part of the debt was 75*l*. 7*s*. 10*d*.; and, as the sum paid into Court was 72*l*. 19*s*. 6*d*., the plaintiff was on this supposition entitled to a verdict for 2*l*. 8*s*. 4*d*. The defendant's counsel contended that the plaintiff was entitled only to one twelfth part of the debt paid, the original cocontractors being twelve; and, as one twelfth was 62*l*. 16*s*. 6*d*., the payment into Court was, on this supposition, more than sufficient. But, supposing that the right sum was 75*l*. 7*s*. 10*d*., as contended for by the plaintiff, the defendant's counsel contended that *Schneider* had, on that supposition, overpaid the plaintiff 24*l*. 12*s*. 2*d*., and that the defendant was entitled to the benefit of one ninth of that overpayment, or 2*l*. 14*s*. 8*d*.; which would turn the scale in his favour. The learned Judge directed a

verdict for the plaintiffs for 2*l*. 8*s*. 4*d*., with leave to move to enter a verdict for the defendant on either point. He said he would amend by adding a plea of payment, if necessary to raise the last point; but the plaintiff's counsel did not require the amendment to be made.

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Crowder, in the same Term, obtained a rule *Nisi* pursuant to the leave reserved.

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This case (against another of the five) was afterwards tried before Lord *Campbell* C. J., at the *Westminster* sittings after *Hilary* term. On the trial of this cause the jury found that the number of cocontractors was only five (a). The Lord Chief Justice directed a verdict for one fifth of the debt.

In *Easter* Term, *April* 19th, *Shee* Serjt. moved for a new trial in *Batard v. Douglas*, on the ground that the plaintiff and defendant, being members of a provisional committee, had many cross liabilities in respect of the scheme, and that it was a misdirection to direct the jury to find a verdict for contribution in respect of one of them. In *Cowell v. Edwards* (b) Lord *Eldon* doubted whether, even as between cosureties, an action at law would lie in a complicated case: and he repeats the remark in *Craythorne v. Swinburne* (c).

LORD CAMPBELL C. J. The objection made is not tenable. If provisional committee-men were partners the action would not lie: but it has been solemnly

(a) The jury in *Batard v. Hiliard*, which was afterwards tried, found that the number of cocontractors was eight.

(b) 2 B. & P. 268.

(c) 14 Ves. 160. 164.

1853. decided that provisional committee-men are not, as
 BATARD partners, liable on all transactions entered into by any
 V. one of them, but that the liability in each case depends on
 HAWES. the actual contract made, taking each separately as an
 isolated transaction, and as if that was the only contract
 made. I think there is no third class known to the law;
 either they are partners or they are not: and, if they
 are not, the rights arising on one contract cannot be
 varied because there are others.

WIGHTMAN J. It being decided that the liabilities of
 provisional committee-men are not those incident to a
 partnership, they must be those arising on a series of
 separate contracts; and at common law each cocon-
 tractor is liable for contribution.

ERLE J. and CROMPTON J. concurred.

Shee then, on affidavits, obtained a rule *Nisi* for a new
 trial, or to reduce the damages.

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Bramwell and *Prentice*, in last *Easter* Term (a),
 shewed cause in *Batard v. Hawes*. First: the proper
 divisor of the debt was ten. At the time the debt
 was paid by the plaintiff, the plaintiff and the defendant
 were liable, at law, to be sued along with eight others
 and no more; and the plaintiff, having paid the whole
 debt, is entitled to recover from each one tenth. There
 was no remedy at law for *Baley* against the estate of
 the two deceased committee-men: the plaintiff, having
 paid *Baley*, is on principles of equity entitled to the

(a) The case was heard on *April* 28th, before Lord *Campbell* C. J.,
Wightman, *Erle* and *Crompton* Js.; and on *April* 29th, before Lord *Camp-*
bell C. J., *Wightman* and *Crompton* Js.

same redress which *Baley* had, but no more. It would be strange if, by paying *Baley*, the plaintiff could create a legal liability on the part of the executors of the deceased cocontractors, when there was none before; yet, if the liability of the surviving cocontractors is to depend on the original number, the plaintiff must have a remedy at law against the executors of the deceased; for which there is no precedent. Then, as to the other point: *Schneider* did not pay, nor did the plaintiff accept payment, as in satisfaction of the defendant's debt: it was a compromise of the claim against *Schneider* himself. The legal liability of cocontractors to contribute to the one who has paid the whole is not a joint liability, of cosureties for the whole, but a separate liability of each to contribute an aliquot part: had *Schneider* failed to pay, the defendant's liability would not have been increased at law; neither is his liability diminished because *Schneider* has paid too much.

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Crowder and *Ogle*, contra. The real principle of the action for contribution is that it is an equitable principle introduced into the law: and the Court therefore must look to the equitable liabilities. The ground on which contribution is given is explained, in *Craythorne v. Swinburne* (a), by Sir *Samuel Romilly* in the course of his argument; and his explanation is adopted by Lord *Eldon* in the judgment. It does not depend upon a contract between the parties, but upon a principle of equity that all should contribute equally to the payment of the debt to which all were liable: and the law, adopting that, implies a promise. [*Crompton J.* But the promise is not implied till the payment; and,

(a) 14 Ves. 160.

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at the time of the payment, as is pointed out by Mr. *Bramwell*, the creditor had a legal remedy against nine besides the plaintiff, and no more. If the plaintiff is, by paying *Baley*, put in *Baley's* place, he would have a legal remedy against those nine and no more.] The cause of action is not complete till the payment; but the promise implied is to contribute according to the equitable liability; and the equitable liability depends, not on the number of parties at the time of the payment, but on the original number. It would be very inconvenient if the liability were to vary from day to day according as the parties lived or died, or paid more or less. Perhaps the point is best illustrated by an imaginary case. Suppose, instead of paying the whole debt of 753*l.* 18*s.* 7*d.* in 1850, *Batard* had in the lifetime of the two deceased cocontractors paid on account 100*l.* He would then have paid more than his share, and would have a right of action against *Hawes* for one twelfth of that overpayment; but, if afterwards *Baley* applied to *Hawes* for payment of the residue, and received more than 100*l.* from *Hawes*, then, according to plaintiff's reasoning, *Hawes* would have a cause of action against *Batard* for one twelfth of what *Hawes* had paid beyond what *Batard* had paid; for by so paying he relieved *Batard* from a legal liability to *Baley*; and *Batard* would, on these principles, have no defence, though he had already paid more than his share; and so the rights and liabilities would vary toties quoties with the payments. But, if the time of the contracting of the liability be looked to, and the implied promise be taken to be made then, and to be that each shall contribute such an aliquot part according to the then number of contractors, no such difficulty arises. [*Crompton J.* Could the plaintiff

then, instead of declaring for money paid, have maintained a special count on a promise, in consideration of plaintiff entering into a joint liability with defendant, to contribute an aliquot part?] Probably he could. [Lord Campbell C. J. Has it ever been decided that an action will not lie against the executor of a deceased cocontractor for contribution?] It has not: such an action probably does lie; *Prior v. Hembrow* (a). But, supposing that the action does not lie against the executors, the plaintiff is no worse off than if the two cocontractors, instead of dying, had become insolvent. That would not have entitled him to sue the defendant for more than his proportion. This is laid down in *Story on Equity Jurisprudence*, sect. 496. vol. 1. p. 398 (2d edition), where it is said: "Thus, if there are four sureties, and one is insolvent, a solvent surety, who pays the whole debt, can recover only one fourth part thereof (and not a third part) against the other two solvent sureties. But in a court of Equity, he will be entitled to recover one third part of the debt against each of them." *Story* there refers to *Cowell v. Edwards* (b) and *Browne v. Lee* (c). The plaintiff, if he chooses to sue at law, must have his action subject to legal incidents. If he goes into equity he may make all contribute, and will have equitable relief. The principles on which the action of contribution is founded are discussed in *Craythorne v. Swinburne* (d), in Mr. Smith's note (e) to *Lamplough v. Brathwait* (g), and in *Theobald on Principal and Surety*, p. 266.

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(a) 8 M. & W. 873.

(b) 2 B. & P. 268.

(c) 6 B. & C. 689. 697.

(d) 14 Ves. 160.

(e) 1 Smith's Lea. Ca. (3d edit.) 71 a.

(g) Hob. 105. (5th edit.).

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As to the second point. The defendant is entitled to the benefit of the over-payment by *Schneider*. The plaintiff was on equitable principles entitled to be indemnified in consequence of his having paid the whole debt; but he is not entitled to make a profit of it. [*Erle J. Schneider* made a compromise of his own case; for that purpose he pays 100*l.*; it turns out to be too much; and you say the defendant is entitled to the benefit of the overpayment. Suppose it had turned out to be too little. Do you say that the defendant would be liable to make good the deficiency?] Whatever payment the plaintiff received from the contributor must be taken to have been received in reduction of the debt; *Knight v. Hughes* (a). That was indeed only a *Nisi prius* decision; but it was not questioned by the counsel of the plaintiff.

Bramwell, at the close of the argument, referred the Court to *Rawstone v. Parr* (b), *Sumner v. Powell* (c), 2 *Williams on Ex.* 1481 (4th ed.) (Part IV. B. II. ch. 1. § 2.).

Cur. adv. vult.

In the same Term (d), *Bramwell* and *Prentice* shewed cause in *Batard v. Douglas*, and *Ph. Francis* was heard in support of the rule. *Deering v. The Earl of Winchelsea* (e), *Harbert's Case* (g), *Rich v. Barker* (h) and

(a) 3 C. & P. 467.

(b) 3 Russ. 424, 539.

(c) 2 Mer. 30.; 1 Turn. & R. 423.

(d) May 5th. Before Lord Campbell C. J., *Wightman, Erle* and *Crompton J.*

(e) 2 B. & P. 270.

(g) 3 Rep. 11 b.

(h) *Harv.* 131.

5 *Vin. Abr.* 562 (*Contribution and Average*, pl. 14.) were referred to. It is unnecessary to report the argument more fully, on account of the argument in the former case.

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Cur. adv. vult.

LORD CAMPBELL C. J., in this Term (*May* 31st), delivered the judgment of the Court.

It appeared in this case that the plaintiff, the defendant, and several other persons, had jointly employed Mr. *Baley*, an engineer, to make plans and sections, and to do engineering work, preparatory to bringing a bill for a railway before Parliament. The plaintiff was sued by *Baley* for the amount of his bill, and was obliged to pay him: and he then brought the present action, to recover from the defendant his share of contribution.

The jury found, at the trial, that there were twelve persons, including the plaintiff and the defendant, who were parties to the original employment of and contract with *Baley*; and that two of those persons had died before the payment by the plaintiff to *Baley*. The defendant had paid into Court an amount sufficient to cover one twelfth of the amount of the payment to *Baley*, but not sufficient to cover one tenth of that amount. And the question thus arose for our consideration, Whether the amount to be recovered by the plaintiff under the above circumstances was to be calculated according to the number of original joint contractors, or according to the number of those who were alive when the payment was made, and against whom the right of the creditor to sue at law had survived.

The point appeared to us to be one which would

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admit of considerable doubt: and we took time to consider our judgment.

If the right to contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability, we should have to look to the number of cocontractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into. To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either express or implied by law. Where one party enters into a legal liability for and at the request of another, a request to pay the money is implied by law from the fact of entering into the engagement; and, if the debt or liability is incurred entirely for a principal, the surety, being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so. In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each cocontractor ought to pay as between themselves; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his cocontractors at the request of such cocontractor; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is

relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement. If the original arrangement was inconsistent with the fact that each was to pay his share, no action for such contribution could be maintained. Thus, if, by arrangement between themselves, one of the joint contractors, though liable to the creditor, was not to be liable to pay any portion of the debt, it is clear that no action could be maintained against him; though, if the relief from the legal liability were alone looked to, it would follow that he was liable to contribute. So, where one surety enters into an engagement of suretyship at the request of his cosurety, it has been held that the cosurety, paying the whole, can maintain no action; *Turner v. Davies* (a).

Our opinion is in conformity with the cases in which it has been held that a cosurety is not liable at law to a greater extent than his share, with reference to the original number of sureties, notwithstanding the insolvency of one or more of the cocontractors; and also agrees with the rule laid down by Mr. Justice Bayley, in *Browne v. Lee* (b), where he says: "I think, that at law, one of three cosureties can only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of sureties."

It was urged before us, by Mr. Bramwell, that, if there were an implied original arrangement between the cocontractors, an action ought to be maintainable on such promise against the executors of a deceased cocontractor; and he said that there being no instance of such an action went strongly to shew that there was no such

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(a) 2 *Esp. N. P. C.* 479.(b) 6 *B. & C.* 697.

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original engagement. It might be said, on the other hand, that there is no instance in the books of the party who has paid recovering more than an aliquot proportion with reference to the original number of cocontractors, by reason of the death of one or more of them. But it is a more satisfactory answer, that there is very strong authority for holding that such an action will lie against executors.

In *Ashby v. Ashby* (a) those very learned Judges Mr. Justice *Bayley* and Mr. Justice *Littledale* rely on such an action lying against executors as the ground of their judgments on the point directly before them. Mr. Justice *Bayley* says (b): "To put a plain case, suppose two persons are jointly bound as sureties, one dies, the survivor is sued and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid, and I think he is entitled to sue the executor of the deceased for money paid to his use as executor." And Mr. Justice *Littledale* says (c): "Suppose that a plaintiff had become bound jointly with a testator, and after his death had paid the whole debt; I should think that an action against the executor for money paid to his use might be supported, and that the plaintiff would be entitled to judgment *de bonis testatoris*." See also 2 *Williams on Executors*, 1st edit. 1088 (d). Such an action against executors can only be supported on the ground of the existence of such an implied original engagement as we have adverted to, which, being made in the testator's time, would bind the

(a) 7 B. & C. 444.

(b) 7 B. & C. 449.

(c) 7 B. & C. 451.

(d) Vol. II. p. 1509, in 4th edition; Part IV. Bk. II. Ch. 2. § 1.

executors; and such an engagement, if implied, would form a good legal ground for supporting the action of money paid.

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We were pressed also with the dictum of Lord *Eldon* in *Craythorne v. Swinburne* (a), referred to by *Parke* B. in *Kemp v. Finden* (b) and in *Davies v. Humphreys* (c), as to the action of contribution being founded rather upon a principle of equity than upon contract. The expressions of Lord *Eldon*, however, will be found to relate rather to the origin of the implied contract than to the time at which it is to be taken to be made. He says: "and I think, that right is properly enough stated as depending rather upon a principle of equity than upon contract: unless in this sense; that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times Courts of Law have assumed a jurisdiction upon this subject." This passage must be taken to admit the existence of an implied contract, and does not appear to us to be inconsistent with, or to outweigh, the clear expression of the opinion of the Judges in *Ashby v. Ashby* (d).

Several inconveniences and difficulties were pointed out on both sides, in the course of the argument, as likely to arise from the adoption of each of the rules contended for: but we think that the rule suggested by the defendant's counsel will be found much more simple, and less liable to the inconveniences pointed out, than that contended for on behalf of the plaintiff.

(a) 14 Ves. 164.

(b) 12 M. & W. 421. 424.

(c) 6 M. & W. 153. 168.

(d) 7 B. & C. 444.

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After entertaining considerable doubt on the subject, we have come to the conclusion that the rule most in conformity with the authorities, the principles of law and the convenience of the case, is to look to the number of original cocontractors for the purpose of determining the aliquot part which each contributor is to pay. And, the defendant in the present case having paid into Court a sum sufficient to cover the amount due in proportion to the number of the original contractors, the rule for entering the verdict for the defendant must be made absolute.

Our decision upon this point renders it unnecessary to say anything upon the question raised as to the right of the defendant to credit for the over-payment by one of the cocontractors.

Rule absolute.

In *Batard v. Douglas*, where the question was whether the damages should be reduced from a fifth to an eighth or a seventh of the sum paid by the plaintiff to the creditor, the rule will be absolute for reducing the damages to the amount of an eighth.

Rule accordingly.

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JOHN FROST *against* EDWARD OLIVER.

DECLARATION for goods sold and delivered, money paid, and money found due on an account stated. Plea: Never indebted.

On the trial, before Lord *Campbell* C. J., at the *London* sittings after last *Hilary* Term, a verdict was found for the plaintiff.

In last *Easter* Term *Bramwell* obtained a rule *Nisi* for a new trial.

In the same Term (a), *Shee* Serjt. and *Bovill* shewed cause; and *Bramwell* and *Barstow* were heard in support of the rule.

about the time he supplied the goods, inspected the register. Defendant afterwards sent the vessel on another voyage with a different captain aboard, and carrying with her all the rope which plaintiff had sent for the running rigging, most of it worked up, but some not. Plaintiff made out an invoice, debiting "Captain *T.* and the owners," and demanded payment from defendant, who denied his liability. Defendant proved, on the trial, that he had made an agreement to sell the ship to *G.*, to be employed as an emigrant ship, defendant to repair her so as to be approved by the Emigration Commissioners, and *G.* to pay the price out of the freight. *T.* was appointed master by *G.*; and defendant never saw him or desired him to order anything for the ship: but there was evidence that *T.* was put on the register with defendant's concurrence, and that, whilst *T.* was acting as master, defendant kept concurrent possession of the vessel, and executed some other repairs, and also paid the dock dues; and that the new running rigging ought, under the agreement, to have been supplied by him, the Emigration Commissioners having condemned the old running rigging. Defendant not being satisfied as to payment by *G.*, and the agreement not being binding under the Registration Acts (as it did not recite the certificate of registration), took exclusive possession of the vessel.

On these facts the case was left to the jury, who found for the plaintiff.

Held: that there was evidence, under these circumstances, to go to the jury that the plaintiff supplied the new running rigging on the credit of the defendant, and that defendant had given *T.* authority to pledge defendant's credit for the rigging so supplied.

Per Lord *Campbell* C. J., *Wightman* and *Crompton* Js. *Erle* J. dissentiente.

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The facts, so far as they are important to the decision of the Court, and the arguments of counsel will be sufficiently collected from the judgments.

Cur. adv. vult.

In this Term (11th *June*) the learned Judges, being divided in opinion, delivered their judgments *seriatim* (a).

Lord
 Campbell C. J.

LORD CAMPBELL C. J. This was an action against the defendant, as owner of the ship *Progress*, for the value of rope supplied for her running rigging. At the trial, it was proved, on the part of the plaintiff, that the defendant, a merchant at *Liverpool*, in *July* 1850 was, and still continues to be, the sole owner of this ship registered at *Liverpool*; that, with his privity, one *Thompson* was registered as master of the ship, in the beginning of *September* 1852, and so continued till 11th *January* 1853; that the ship, in the beginning of *September* 1852, was in a dock in the port of *London*, to be repaired and fitted out for a voyage to *Australia*, to carry out emigrants; that *Thompson* was then acting as master of the ship; that her running rigging was rotten, and had been condemned by the Emigration Commissioners; that new running rigging was necessary to fit her for the voyage; that *Thompson* ordered the rope in question for the new running rigging; that it was supplied by the plaintiff upon that order; that the plaintiff caused the ship's register at the custom house to be inspected, but the evidence did not clearly shew

(a) Lord Campbell C. J. stated that it would be convenient that his judgment, as it contained a full statement of the facts, should be read first.

whether this was before or after the rope was supplied ; that the rope was used in making the new running rigging ; and that the ship sailed on the voyage in the beginning of 1853, in the employment of the defendant, under a different master.

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On the part of the defendant it was proved that, on the 14th of *July* 1852, he entered into a written agreement with one *Gompertz*, to sell the ship to him for a sum specified ; that she was to be employed as an emigrant ship in a voyage to *Australia* ; that the defendant was to repair her, so that she should be approved of by the Emigration Commissioners ; that *Gompertz* was to pay the purchase money out of the freight to be received from the passengers ; that this agreement did not recite the certificate of registry ; that *Gompertz* appointed *Thompson* master of the ship, for a voyage to *Australia* and back ; that, on the 4th of *September*, *Thompson* went on board and began to act as master ; that on the 9th of *September* he signed a receipt for the ship, but that the defendant still kept three ship-keepers on board of her ; that they acted under the orders of one *Jackson*, an agent of the defendant, who was superintending the repairs of the ship for him, and who paid them their wages ; that, moreover, one *Macalpine*, an agent of the defendant, remained on board and gave orders respecting the ship and her repairs ; that the dock dues for all the time she was under repair were paid by the defendant ; that by the defendant's order, while she so lay in the dock, she was new coppered, and was supplied with new standing rigging at the defendant's expence ; and repairs were done to her to the amount of 1200*l.* ; that *Thompson*

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had taken a small quantity of goods on board for passengers; that, the defendant not being able to obtain payment of the purchase money, and the agreement being void for not reciting the certificate of registry, the defendant, in the month of *October*, caused the ship to be taken from the dock where she lay, in the absence of *Thompson* and without any notice to him; that the defendant afterwards remained in the exclusive possession of the ship, and, having completed her outfit, sent her on the voyage under another master; that he gave orders for delivering up the goods of the passengers, and all things remaining moveable, which had been put into the ship while *Thompson* acted as master; that the greatest part of the rope supplied by the plaintiff had been worked up into the running rigging during that time, but that some coils remaining on board had not been worked up; that the whole was carried off in the ship, and no part of it returned to the plaintiff; that the defendant had never seen *Thompson*, nor given him any directions to purchase anything for the use of the ship; that the plaintiff and *Thompson*, who did not before know the plaintiff, having, about the middle of *September*, met him in a railway carriage, one *Hutchinson* asked the plaintiff to supply *The Progress* with rope; that the plaintiff said: "certainly; who is to give me the order?" that the answer was "Captain *Thompson*;" that *Thompson* did give the order, and the rope was supplied accordingly; that the invoice, made out in the usual form, debiting "Captain *Thompson* and owners," was sent to the defendant on the 7th of *December* with a demand of payment; and that he returned it on the 15th of *December*, denying his liability.

There was a verdict for the plaintiff for 295*l.* 17*s.* 1*d.*, the value of the rope; and a rule was granted to shew cause why there ought not to be a new trial on the ground of misdirection.

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Upon the argument, it was very confidently contended that no *prima facie* case was made by the plaintiff, and that no liability would have been established against the defendant even if he had not entered into any agreement to sell the ship, and *Thompson* had been appointed master by the defendant himself, as the goods, although necessary for the equipment of the ship, were ordered and supplied, not in a foreign port, but in the port of *London*. This point was not made at the trial; and I conceive that it is wholly untenable. I have always understood that, both at home and abroad, the master of a ship is presumed to have authority to bind the owners for repairs or stores ordered by him which are necessary for the equipment and navigation of the ship in the voyage or trade in which the owners employ her. Thus is the law laid down by Lord *Tenterden* in his book *On Shipping* (8th edit. p. 134). "As the master in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship; the business of fitting out, victualling, and manning the ship, being left wholly to his management in places where the owners do not reside, and have no established agent; and frequently also even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in those cases." Mr. *Bramwell* rested his new doctrine on the judgment of the Court of Exchequer

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in *Beldon v. Campbell* (a), in which he was counsel. That case, when examined, will be found to be good law, but to have little application to the present. The question there was respecting the authority of the master to bind his owners by borrowing in this country money not immediately necessary for the prosecution of the voyage. *Parke B.* says: "The master is appointed for the purpose of conducting the navigation of the ship to a favorable termination, and he has, as incident to that employment, a right to bind his owner for all that is necessary, that is, upon the legal maxim—'quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.' Consequently the master has perfect authority to bind his principal, the owner, as to all repairs necessary for the purpose of bringing the ship to its port of destination; and he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, that is to say, where certain payments must be made in the course of the voyage, and for which ready money is required." He then goes on to shew that, in the case under the consideration of the Court, the master, after a debt had been contracted, went and unnecessarily borrowed money from the plaintiff to enable him to pay this debt. *Martin B.* gives the ratio decidendi in the following pithy sentence: "The true principle is, that the master has not authority to borrow money after the work has been done, for the purpose of paying the debt due for it."

I cannot doubt therefore that, if the Judge at the close of the plaintiff's case had been asked to direct a

(a) 6 *Erch.* 886.

nonsuit, he would have been bound to have left the evidence to the jury, with strong observations that, unanswered, it entitled the plaintiff to a verdict.

But we are now to consider the effect of the important evidence which was given on the part of the defendant. And here the question arises, Whether, after that evidence was given, any question remained for the jury except whether they believed the defendant's witnesses, and whether they ought to have been directed that, if they did, they were bound to find a verdict for the defendant.

After very attentively considering the able arguments urged before us on this part of the case, I am of opinion that the evidence, although believed, does not necessarily exempt the defendant from liability. I must begin by observing that this case is clearly distinguishable from those in which the owner, under a charter-party, has parted entirely with the possession of the ship, and the master, subsequently appointed by another, cannot be considered the agent of the owner. Even if I were to assume that *Gompertz* might have been sued, although his counsel might have argued that, by the special agreement between him and *Oliver*, the latter was bound to supply all repairs necessary to render the ship fit for the voyage, including the running rigging, I do not think it impossible that the defendant may likewise be liable. In the common case of repairs ordered by the captain within the scope of his authority as master, the bill being made out to master and owner, it is laid down in all the books on the subject that either he or the owners may be sued. Again, departing from these peculiar contracts depending partly upon the law merchant, suppose that *A.* were to authorize *B.* to buy goods for him from *C.*, and

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D. were to represent to *C.* that *B.* was his, *D.*'s, agent, and *C.* should thereupon sell the goods to *B.*, who should deliver them to *A.*: I apprehend that, although *C.* might sue *A.* who actually authorized *B.* to buy the goods as his agent, he might make his election to sue *D.* who held out *B.* as his agent with authority to buy the goods for him. Is there not some evidence from which it may be inferred that the defendant, in this case, held out *Thompson* as his agent with authority to order the necessary repairs for the ship, or that he concurred in the appointment of *Thompson* as master. The defendant was the sole owner of the ship; and *Thompson*, with his privity, was registered as master, although appointed by *Gompertz*. There was strong evidence that the defendant continued in possession of the ship while *Thompson* was acting as master, from the ship-keepers whom he employed for that purpose, from *Macalpine* his agent who continued on board to superintend the repairs, from the presence of the workmen employed upon her, from the controul over the ship exercised by his agent *Jackson*, and from his payment of the dock dues for all the period during which the repairs were going on. In one sense, the ship may have been said to have been in the possession of the owners of the dock, who were paid by him to keep possession of her. The defendant, likewise, seems to have had a strong motive for not parting with the possession of the ship, that he might retain his lien upon her for the purchase money, being evidently suspicious of the solvency of the purchaser. If the owner was actually in possession of the ship, may he not be considered as holding out all those who were engaged in the management of the ship as being employed by him, and as his

agents? And why not the master as well as the ship-keepers, *Macalpine* and *Jackson*? He would not be liable for the acts of the master to any who knew that the master was not appointed by him and that he had been appointed by *Gompertz* the purchaser. But the plaintiff is not shewn to have known anything of *Gompertz*; and the jury might reasonably believe that, having directed the register to be searched, he gave credit to what he there saw, viz. : that *Oliver* was owner and *Thompson* master; so that he may be presumed to have supplied the goods on the credit of *Oliver*, which would be perfectly consistent with the heading of the invoice.

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Was there not then some evidence to leave to the jury of the liability of the defendant, as owner, for the goods ordered by the master while the ship remained under his controul? If there was, I do not see how it could have been left differently to the jury. They were asked to consider whether they believed that the ship remained in the possession of the defendant while *Thompson* acted as master, and the repairs were going on; and whether they were of opinion, upon all the evidence in the case, that the defendant authorized the order given for the goods supplied by the plaintiff for the use of the ship.

In *Williamson v. Page* (a) it is laid down that in all such cases it is a question for the jury, whether, under the particular circumstances, the master's position was such as to constitute him the authorized agent of the owner to bind him? In the cases in which it was held that mere legal ownership does not necessarily create

(a) 1 Car. & K. 581.

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liability for repairs done to the ship, language is used by the Judges quite consistent with this defendant being held liable. Says Lord *Ellenborough*, in *Young v. Brander* (a): "It was never heard of that, if a stranger ordered repairs for another's ship or carriage, the owner was liable for such repairs. Suppose a pirate ran away with a ship, would the owner be liable for repairs ordered by him?" Can the defendant, having been in possession of this ship in *Wigram's* dock, and having had the benefit of the repairs, which were ordered by a master acting as such while he so had possession, be compared to the owner of a ship run away with by a pirate? In *Jennings v. Griffiths* (b), in which Lord *Tenterden* held that, although legal ownership is *primâ facie* evidence of liability for goods ordered by the master, it was rebutted by proof of the beneficial interest having been parted with, he mainly relied upon the fact of the legal owner having entirely ceased to interfere with the management of the ship. Here the defendant had not parted with the beneficial ownership; and he actually retained the possession of the ship, and continued beneficial owner of her when she was enhanced in value by the plaintiff's goods. The present case much more closely resembles the case of *Dowson v. Longford* (c), which Lord *Tenterden*, in *Jennings v. Griffiths* (b), quotes and approves of. "There," says he, "the registered owner had parted with his interest in the ship, but with a stipulation that he should retain possession of the bill of sale, and receive part of the profits, until the bills, in consideration of which the transfer was made, should be paid." The

(a) 8 *East*, 10.(b) *Ry. & Moo.* 42.(c) Cited in *Ry. & Moo.* 42.

same case is reported, under the name of *Dowson v. Leake* (a), in *Dowling and Ryland's Nisi Prius Cases*, with this marginal note: "Where there were two joint owners of a ship, and one by private agreement, parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register, by way of collateral security for the payment of the bills:—Held, that he was liable for repairs done to the ship subsequent to such agreement, although he had never afterwards interfered in the concerns or management of the ship." After the passing of the Register Acts, says Lord *Tenterden* (b), "the leaning of courts of law in the construction of them, was, to say that the registered owners of ships should at all events be liable for the repairs." He was instrumental in overturning that doctrine: but he never intimated an opinion that ownership was to be disregarded in questions of liability for repairs, or that owners could not be considered liable unless under a contract personally entered into, by themselves, or by a master whom they have themselves actually appointed. I apprehend that such a doctrine would open a wide door to fraud, and would lead to very injurious consequences in this country. According to the Roman civil law, which has been followed by all the continental nations, the tradesman who repairs or supplies stores to a ship is safe; for he has a specific remedy against the ship, even after he has parted with the possession of her; and he may attach and sell her for the amount of his debt. By the law of England he has no remedy but by action against the person of his debtor: and we must take care that he is not deprived

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(a) *Dow. & Ry. N. P. C.* 54.(b) *Ry. & Moo.* 43.

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of this by any mode of dealing resorted to by the owners of the ship who derive a benefit from his work and materials. They cannot be permitted conclusively to repudiate the agency of a master acting as such with their knowledge, while they retain the possession as well as the ownership of the vessel. Under such circumstances, in my opinion a jury should determine the question of liability.

In this case, the question of liability was left to the jury: and I think that their verdict ought not to be disturbed.

Wightman J.

WIGHTMAN J. There was in this case, as it seems to me, evidence of circumstances which would warrant the verdict of the jury in favour of the plaintiff.

It appeared that the defendant, before the sale to *Gompertz*, was both legal and beneficial owner of the ship: that, by the instrument of sale, which was insufficient to convey any legal title to *Gompertz*, the defendant undertook to do certain repairs, sufficient to qualify the ship for the approval of the Emigration Commissioners; and for that purpose, and, as it seems, and as the jury may have well believed from the evidence, for the purpose of a lien for the purchase money, he retained concurrent possession of the ship with *Gompertz*, keeping his own servants on board, and never giving complete or absolute possession of the vessel to *Gompertz*; who had, however, with the knowledge and apparently with the concurrence of *Oliver*, appointed a captain, who acted as such, and was, I believe, the only person on board who was in the employ of *Gompertz* during the time the plaintiff was doing the work which is the subject of the present action; and which was done

whilst the vessel was in port. After the work had been done, and which consisted of the supplying and setting up some of the running rigging, the defendant resumed entire and exclusive possession of the ship in consequence of non-payment of the purchase money, and employed the ship, with the running rigging set up by the plaintiff, upon a voyage upon his own account. During the whole period between the sale to *Gompertz* and the resuming exclusive possession of the ship, the defendant was the legal owner, as indicated by the register, and also the beneficial owner to the extent of holding possession of the vessel until the purchaser had completed his contract, and as a security for the performance of it. It is also to be observed that the running rigging, which was set up by the plaintiff, ought to have been set up by the defendant pursuant to his contract with *Gompertz*.

It appears, then, that the running rigging set up by the plaintiff was supplied for the necessary repair of the ship; that, at the time of the supply, the defendant was the legal and, in part, the beneficial owner; and that it was supplied for a repair which the defendant was by his contract bound to make, to enable the vessel to obtain the approval of the Emigration Commissioners; and that the defendant, and he only, had the benefit of the work done by the plaintiff.

On what ground then is it that the liability of the defendant to pay is disputed?

It is said that the work was ordered, without the knowledge of the defendant, by *Thompson* (the captain appointed by *Gompertz*), and that he was not the agent of the defendant either in fact or law, and had no authority express or implied to pledge his credit; and

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 FROST the action should have been either against the captain
 v. or *Gompertz*.
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The captain was appointed by *Gompertz* and not by the defendant, and gave orders for the repairs to the plaintiff without any express authority from either, and without informing the plaintiff who was the owner, beneficial or legal. There is no doubt that the work was necessary ; and, when completed, the plaintiff made his bill out against the master and owners of the ship. And the question is upon whose credit the work was done.

The legal title to a ship will furnish *prima facie* evidence that repairs are made under the authority and for the benefit of the legal owner : but, if it appear that they were made under the authority and for the benefit of another, the legal owner will not be answerable. Such is stated to be the law in *Abbott on Shipping* (a) : and *Young v. Brander* (b) is referred to as an authority in support of the general proposition. In the later case of *Jennings v. Griffiths* (c) Lord *Tenterden* stated that the true question, in such a case, was, " Upon whose credit was the work done ? " And he distinguished the case before him from the case of *Dowson v. Longford* (d), which was cited, and the circumstances of which more nearly resemble the present than those of any case cited upon the argument. In that case, as stated by Lord *Tenterden*, the registered owner parted with his interest in the ship, but with a stipulation that he should retain possession of the bill of sale, and receive part of the profits until the bills given in consideration of the

(a) Page 32 (8th ed.).

(b) 8 *East*, 10.

(c) *Ry. & Moo.* 42.

(d) Cited in *Ry. & Moo.* 42.

transfer were paid. He had himself been in the habit of employing the tradesmen about the ship, and had given no notification to them that his interest in the vessel had ceased; and the jury found, and properly, in Lord *Tenterden's* opinion, that the work in respect of which the action was brought had been done on his credit. In the present case, though the defendant had never employed the plaintiff himself, he was the legal owner upon the register; was in concurrent possession of the ship with *Gompertz*; was fully aware that *Thompson* was captain, appointed by the latter; was himself employing workmen to do other repairs about the ship, and was by his contract bound to do such repairs as those which were done by the plaintiff, who gave credit to the owners whoever they might be. If he looked to the register, he would find that the defendant was the legal owner: if he went to the ship, he would find that the defendant's servants were in possession, and that other repairs that were in progress for the ship were being done upon his credit. Was not this holding himself out to the world as the beneficial as well as the legal owner? And did not his conduct fully justify the plaintiff in giving him the credit for the work ordered by the captain, whom, by the conduct of the defendant, he might reasonably believe to be the defendant's captain, and the jury in finding the verdict as they did? By allowing *Gompertz* to appoint the captain, whilst he retained the legal and such a beneficial interest in the ship as gave him entire controul over it, during the time that he held concurrent possession, he may be understood to have adopted the appointment of *Thompson* by *Gompertz*, and to have held him out to the world as his captain: and, whilst the parties remained in the

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same relative position, all the usual contracts for repairs necessary for the ship ordered by the captain, within the general scope of his authority as captain, would be apparently quite as much upon the credit of the defendant as of *Gompertz*. And, as the plaintiff acted upon the credit of the owners generally, upon the orders of the captain who did not inform him who the owners were, the jury might, upon the state of facts appearing upon the evidence in this case, be warranted in treating the defendant as beneficial as well as legal owner, and the captain as his agent for the purpose, at all events, of such repairs as he was himself bound to make.

The cases of *Young v. Brander* (a), *Jennings v. Griffiths* (b), *Trewhella v. Rowe* (c) and *Frazer v. Marsh* (d) are all distinguishable from this. In *Young v. Brander* (a) the defendants were legal owners, only, by reason of their names being suffered to remain upon the register after they had done all that it was incumbent upon them to do to convey the legal title to the ship to the purchaser. They never interfered with the ship in any way after the sale; and the purchaser, who appointed the captain, had exclusive possession. All the circumstances which in the present case would warrant the finding of the jury are wanting in that case; and it is therefore distinguishable. In *Jennings v. Griffiths* (b), also, the defendant was charged as legal owner, only because his name appeared in the register: he had transferred his interest to his son, to whom he gave up absolute possession, and never in any way interfered with the ship after. His son, the transferee, appointed the captain who ordered the repairs. That case, there-

(a) 8 *East*, 10.(b) *Ry. & Moo.* 42.(c) 11 *East*, 435.(d) 13 *East*, 238.

fore, is distinguishable for the same reasons that distinguish *Young v. Brander* (a) from the present. *Trewhella v. Rowe* (b) and *Frazer v. Marsh* (c) are distinguishable upon the same ground: that in neither of these cases did the defendants, after parting with the vessels, retain possession, or interfere with the management in any way, but were attempted to be made liable only as legal owners from their names appearing upon the register.

It is to be observed that the only question in the present case is, Whether there was any evidence upon which the jury would be warranted in finding, if they pleased, a verdict for the plaintiff. In my opinion there was such evidence, for the reasons I have given: and I therefore think that the rule for a new trial should be discharged.

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ERLE J. Upon the question, whether the defendant contracted to pay the plaintiff for the goods supplied to the ship *Progress*, the material facts appear to be: that the order for the goods to be supplied to that ship was given by *Thompson*, and that *Thompson* had been appointed by *Gompertz* master thereof for an intended voyage, and had given the order on the behalf and with the authority of *Gompertz*. If these facts were found by the jury, the plaintiff contracted with *Gompertz* as principal, through *Thompson*, his agent, and not with the defendant. And all the other facts, such as the imperfect sale by the defendant to *Gompertz*, and the qualified possession of the ship by *Gompertz*, subject to a possession by the defendant for the purposes both of repair and of retaining a lien for the price, and the loan of the

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(a) 8 *East*, 10.(b) 11 *East*, 435.(c) 13 *East*, 238.

1853. certificate of registry by the defendant's broker for the
FROST insertion of *Thompson's* name as captain, and the refusal
v. of the defendant to supply the goods in question as part
OLIVER. of the repairs he was to do, and the cancelling of the
Eric J. sale of the ship, and the retaking of it with the goods in
question on board thereof by the defendant, were no
evidence that the defendant contracted.

It is admitted, on these facts, that *Gompertz* was liable if the plaintiff chose to sue him: but it has been argued for the plaintiff that, as the defendant had the legal title to the ship, and had possession as above described, and probably knew that a master had been appointed by *Gompertz*, he may be presumed in law to have concurred in that appointment, and to have given the master authority to pledge his credit as owner for supplies to the ship, although in fact he did not concur in that appointment, and had refused to give any order for the supplies in question. From this argument I dissent. The origin of contracts is in the consent of the contracting parties; and the origin of authority to an agent to contract for his principal is in the consent of the principal; and the question, whether there was consent to the contract or to the authority, is to be tried according to the general principles for trying other questions. And I take it to be a general principle that, if direct evidence of the matter to be proved (here of the making of the contract, and of the giving of authority for that purpose) is adduced and believed, the circumstantial evidence from which the matter to be proved might be inferred in the absence of direct evidence then becomes immaterial and irrelevant.

The plaintiff's argument appears to me to contravene these principles. For he contends that, after the direct evidence by *Thompson* both of the making of the con-

tract and of the authority under which he acted, the jury may infer, from circumstances such as the ownership of the ship and the conduct of the defendant, that the authority so proved to be derived from *Gompertz* was also derived from the defendant, and may shift upon *Oliver* against his will the contract of *Gompertz*, and so may create a contract without the consent of the contracting party. Such a course would be inadmissible in an ordinary action for goods sold, where the order is given by an agent: and it appears to me to be equally inadmissible where the goods are supplies for a ship, and the order was given by the master as agent. The doctrine, that the legal ownership of the ship is proof that the master has authority to contract for such owner, has been repeatedly negatived: the decisions have been numerous, and for a long time uniform, that the master has authority to bind those from whom he receives his appointment, and has no authority to bind others by reason of their legal ownership.

In *Young v. Brander* (a) the defendants had sold the ship, and made an invalid transfer; the vendee took possession, and appointed a captain who ordered the repairs, which were done while the defendant's name continued on the register as owner; and the plaintiffs had no notice of the change of ownership; but it was held that the defendants were not liable, although the repairs were ordered by the master while they were owners, they being only liable for orders given by *their* master. This case decides that the origin of the authority of the master as agent stands on the same princi-

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Erie J.

(a) 8 East, 10.

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ple as that of any other agent. In *Briggs v. Wilkin-son* (a), where the managing owner mortgaged his share of the ship to the defendant, and afterwards, while he was acting as master, ordered repairs as master, it was held that the defendant, as mortgagee, was not liable upon this order. This case decides that the master acting in that capacity with the knowledge of the legal owner may be without authority to contract for him, contrary to his intention. Also in *Jennings v. Griffiths* (b) the owner, according to the register, was not liable for goods ordered by the master on behalf of an assignee whose title was not registered. The case of *Dowson v. Longford* (c), as there explained by Lord Tenterden, does not appear to me relevant to the present inquiry. The defendant in that case is said to have established a course of dealing with tradesmen; and he was held liable for goods ordered in that course before he gave notice of a change, according to a well known presumption: but the defendant here had had no prior dealing with the plaintiff. On these authorities, it seems to me that the plaintiff's case does not come within the doctrine, that the acts of the master may be presumed to be by the authority of the owner, because resort to that presumption is excluded by direct proof. It also seems that the plaintiff cannot maintain his claim on the ground that the defendant held himself out as the contracting party, and therefore is precluded from denying it; for the defendant has misrepresented nothing and concealed nothing as between him and the plaintiff, and has merely exercised his rights according to law.

(a) 7 B. & C. 30.

(b) Ry. & Moo. 42.

(c) Cited in Ry & Moo. 42.

I therefore come to the conclusion that the reasoning relied on for the plaintiff is not supported by principle or authority : and I am confirmed in this view by considering the paramount importance of the principle that the making of contracts should be left to the will of the parties, and the consequence of infringing that principle by shifting the contracts made by the agent of one party upon another, against his will, and without knowledge of their number or nature, so that he may make choice as to the right he will enforce, and provision as to the duties he has to perform. And my opinion is for a new trial.

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Erle J.

CROMPTON J. The only question for our consideration in this case is, Whether there was *any* evidence to go to the jury of the defendant's liability.

Crompton J.

It must be taken to be quite settled, as contended for by the defendant's counsel and not disputed at the trial, that the true question in cases of this description is, Upon whose credit, and on a contract with whom, was the work done or were the goods supplied.

The plaintiff, in the present case, when he received the orders for the running rigging, asked, Upon whose orders he was to supply the goods, and was told, By the captain's. He sent in his account to the captain and owners in the usual way; and he afterwards made inquiries as to who appeared to be owners upon the registry, although it was not distinctly ascertained whether these inquiries were made before or after the goods were supplied. He may therefore, I think, have been fairly considered by the jury as intending, when he supplied the goods, to look to the master and owners in the usual way.

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The important question, however, is as to his right, under the circumstances, so to look to the credit of the defendant, the legal owner; in other words, whether there was evidence of any authority on the part of the master to pledge the credit of the defendant by giving the general orders for the supply of the rigging in question; and whether the credit of the owners was so pledged.

It appeared, at the trial, that an executory contract, void under the Registration Acts, for the sale of the vessel to one *Gompertz*, had been entered into by the defendant, the legal owner of the vessel. By the contract, the defendant was to put the vessel into such a state as to satisfy the Emigration Commissioners. And the defendant was to be paid his purchase money out of the freight to be received from the emigration passengers to *Australia*. The possession was to be given up on a certain day; but there was evidence from which the jury must be taken to have rightly found that the defendant kept the possession of the vessel, and retained controul over her, until after the supply of the rigging in question, for the purpose of a lien for his purchase money. And, to secure his receiving it out of the freight, the defendant had agents and ship-keepers in possession of the vessel; and repairs to a great amount were done by the orders of his agents, who would not however order the running rigging (that in question), though probably under the contract it ought to have been supplied by the defendant. It appeared that the register was lent by the agent of the defendant to *Gompertz*, or his agent, on the 8th *September*, and sent down to *Liverpool*, where the vessel was registered: and

the name of *Thompson*, a new captain appointed by *Gompertz*, was placed on the register, the name of the defendant continuing there as the owner. The register was returned to the defendant's agent on the 13th *September*. *Thompson* had gone on board the ship, and acted as master from the 4th *September*, and on the 9th *September* had signed a receipt for her: but the defendant continued in possession of the ship, concurrently with the master, kept three ship-keepers on board, and had his agents attending to her repairs, new coppered her, and supplied all the standing rigging, and paid dock dues. In *October*, not being able to get his purchase money, he took her out of *Thompson's* possession; and, having then exclusive possession of her, sent her to *Australia* on his own account under another master.

Under these circumstances the defendant was to some extent the beneficial as well as the legal owner: he never parted with the controul or management of the vessel: there was evidence of *Thompson* having been appointed captain with his concurrence: and the jury may have regarded *Thompson* as captain to the defendant until the executory agreement was carried out. And the rigging, which was supplied by the plaintiff, would be for the defendant's benefit in the event of the contract of sale not being carried out, and perhaps also in the other event, of its being carried out, if he were, as seemed to be the case, the party bound by the contract to supply it.

I do not think that all these circumstances could properly be withdrawn from the jury, and that they could properly have been told that there was no evidence of any authority to pledge the defendant's credit.

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It is true that there was no immediate express authority from the defendant to *Thompson*, and that the directions to order the rigging in question probably emanated directly from *Gumpertz*: but I think that, in ascertaining whether the case of the plaintiff, founded on supplying goods upon the general authority of the master, was answered by the particular state of facts, the jury were to consider the case in all its bearings, with regard to the defendant having concurred in the appointment of the master, and having allowed him to remain as master whilst he himself continued owner both legally and beneficially, and whilst he as such owner had possession of her, with regard to his having retained the controul and management of the vessel and being in possession of her when the goods were received on board. And, with regard to the fact of the goods being supplied in great measure for his benefit, was it no evidence for the jury that the goods ordered by the master, in whose appointment he had concurred, were received on board the defendant's ship in the defendant's possession, and therefore by his sanction or that of his agents; and that they were really for his benefit. It does not follow, from the ownership or interest in the ship not determining the question of liability, that it is not a material circumstance in ascertaining the question of credit and contract.

The authorities seem to me to confirm this view. They shew, doubtless, that the registration does not alter the liability. It is true that the registration is merely evidence of the ownership: but the ownership, and the circumstances of the controul, possession and management of the vessel, are always considered as important circumstances in determining the question of fact as to

whether the master had the authority of the owner express or implied for ordering the goods.

The question is said by Lord *Tenterden*, in *Jennings v. Griffiths* (a), to be "in most cases" "decided by the fact of legal ownership, the repairs being generally done for the legal owner." So in two cases in the same volume, *Fletcher v. Reid* (b) and *Cox v. Reid* (c), it was distinctly held that the registered owners were *primâ facie* liable. These cases were long after it was settled that the registration was by no means conclusive, and that the question was one of credit: and in the latter case the law on the subject was explained, and the *primâ facie* case against the owners was rebutted by the special circumstances. The rule of law was thus laid down in that case (d): "It is true that the registered owner is *primâ facie* liable for repairs, because it must be presumed that work from which he derives a benefit was done with his privity." So in *Stokes v. Carne* (e) Lord *Ellenborough*, who was well aware of what had been decided in *Young v. Brander* (g), speaks of the owners as being liable as in the common case of stores or repairs ordered by the master of a merchant vessel. Other authorities to the same effect have been already referred to: and I do not think that there is any authority to the contrary.

Then, how is the *primâ facie* case to be rebutted? Surely by proof of all the circumstances by which the contract is proved to have been made with, and the credit given to, another, and not to the legal owner. And all the facts on the one side and the other, as to such contract and credit, must be for the jury.

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(a) *Ry. & Moo.* 42.

(e) *Ry. & Moo.* 199.

(c) 2 *Campb.* 339.

(b) *Ry. & Moo.* 202, note (a).

(d) *Ry. & Moo.* 201.

(g) 8 *East*, 10.

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The authorities are very distinct as to the controul and possession of the vessel, and as to the party who is to benefit by the supplies, being material circumstances in such inquiry. In the cases of *Cox v. Reid* (a) and *Fletcher v. Reid* (b) the law as to the credit was explained to the jury; and the facts as to the controul and management, and for whose benefit the work was done, were submitted to their consideration. The case of *Jennings v. Griffiths* (c), and the case of *Dowson v. Longford* (d) there referred to, are particularly worthy of observation, as having been decided by Lord Tenterden, who may be said to have been better acquainted with this particular subject than any other Judge, and who repeatedly acted upon and laid down the rule as to questions of this kind depending on contract and credit, and not on registration or mere ownership; and who was most unlikely to have stated anything inconsistent with the doctrine, of questions of this kind depending on contract, so well recognised at the time of the decision in question. After stating the general rule as to such questions being for the most part decided by the ownership, to which I have before referred, that learned Judge proceeds: "But it may so happen that the name of a person may be retained on the registry, after he has ceased to be *beneficially, interested in the ship, or to interfere with its concerns.*" Why were those facts so referred to by Lord Tenterden, if they were utterly unimportant for the consideration of the jury? He then proceeds to illustrate what he was laying down by a reference to the case of *Dowson v. Longford* (d), a case more nearly resembling the present than any other in

(a) *Ry. & Moo.* 199.(b) *Ry. & Moo.* 202, note (a).(c) *Ry. & Moo.* 42.(d) Cited in *Ry. & Moo.* 42.

the books. "There," he says, "the registered owner had parted with his interest in the ship, but with a stipulation that he should retain possession of the bill of sale, and receive part of the profits, until the bills, in consideration of which the transfer was made, should be paid. He had himself been in the habit of employing the tradesmen about the ship, and had given no notification to them that his interest in the vessel had ceased. And the jury very properly said, that the work had been done on his credit." It is said that this decision proceeded on the ground of the defendant having employed tradesmen through an agent, and not having notified the ceasing of the authority. If in that case the plaintiff were one of the tradesmen who had been employed as before, or if the orders were given through the same master, neither of which distinctly appears, the present case would in that respect be less strong against the owner than that of *Dowson v. Longford* (a): but in other respects it is very similar, and in some even stronger. The lien on the bill of sale for the payment of the bills accepted for the purchase is not so strong as the actual keeping possession of the ship for the purpose of obtaining the freight: and the stipulation for the payment out of the freight is of the same nature as the agreement for the share of the profits. If the case were decided merely on the doctrine of the non-communication of the ceasing of the authority, why should so very accurate a lawyer as Lord *Tenterden* have relied on the other facts? The authority of this case is distinct, as shewing that facts of the nature of those in the

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(a) Cited in *Ry. & Moo.* 42.

1853. present case are to be submitted to a jury, the proper judges of the question to whom the credit was given.

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But, on looking to the authorities which are supposed to establish the case of the defendant, I find them all consistent with, and many of them confirmatory of, the doctrine of the materiality of circumstances like those in the present case, as rebutting or confirming the liability of the legal owners. In *Young v. Brander* (a) the defendant had sold his vessel, had ceased to have had anything to do with her or her concerns; he had done all he could as to perfecting the sale: and the only case against him was that the vendee had not performed some of the requisites of the registration acts. There was an entire absence of the circumstance of possession, or controul of or interest in the ship, which are to be found in the present case. *Young v. Brander* (a), therefore, is not at all inconsistent with the plaintiff's proposition in the case at bar. In *Briggs v. Wilkinson* (b) the mortgagor of the ship continued to make contracts as managing owner. The mortgagee completed his title on the registry, but did not take possession or interfere in the concerns of the ship: and it was most properly held that he was not liable, by reason of the legal ownership, on the mortgagor's contracts. It may be observed that the counsel for the defendant, Sir *James Scarlett* and Baron *Parke*, distinguish the case from those where repairs or stores have been ordered by the master, who, they state, is of necessity the agent of the owners if employed generally by them. Lord *Tenterden* refers to the mortgagee never interfering with the

(a) 8 *Eust.* 10.

(b) 7 *B. & C.* 30.

concerns of the ship. And Mr. Justice *Bayley* properly treats the case as one where the defendant had merely the legal ownership as mortgagee. In *Frazer v. Marsh* (a) Lord *Ellenborough* relies on the fact of the registered owner having divested himself, by the charter-party, of all controul and possession of the vessel, for the time being, in favour of another who has all the use and benefit of it. When I find observations as to the fact of the controul and possession, and the benefit to the party, occurring in so many cases, I should feel it difficult to say that the controul and possession remaining in the party who is or may be benefitted by the supplies is not matter to be considered by a jury.

In *Reeve v. Davis* (b) the charterer of the steam vessel in question was the captain, to whom she had been let by the defendants for twelve months: and the only pretence for the defendants' liability was from the fact of the defendants having to keep the engines in repair. The counsel for the defendants relied on the fact of the owners having given up their legal controul at the time, of their having retained no controul over the vessel, and having no right to go on board of her, and on the charterer being bound to do the repairs with an immaterial exception. Lord *Denman*, in his judgment, refers to the controul over the vessel as a material point. Mr. Justice *Littledale*, after laying down the general rule as to the primâ facie liability of the owner, says that the party for whose profit the ship is in reality employed at the time has the benefit of the work done on board, and is liable to the tradesmen who does. The case of repairs done to a house or a ship or a carriage were mentioned

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in the argument in the present case: and I quite agree that they stand on the same footing as repairs done to ships, with regard to the ownership not being the necessary criterion of the liability. But I do not agree that the ownership is not of great importance in ascertaining, as a question of fact, to whom the credit was given and with whom the credit was made.

In applying to the present case the principles to be deduced from the authorities, and from the general rules of law, I cannot say that I am satisfied that there was no evidence to go to the jury in a case where the defendant remained the legal and to some extent the beneficial owner, where he retained the possession and controul of the vessel for the security of his purchase money, and was to have a direct interest in her profits for the payment of his purchase money, where he was by the contract to do the general bulk of the repairs, and probably to supply the matters in question, and where there was, as I think, evidence for the jury of his having concurred in the nomination of the captain, and of his being in the relation of owner to the new captain, and where the goods were received on board the vessel whilst under the direct controul of his own agents, and where he was to receive benefit from them by getting paid out of the freight if they enabled the vessel to be in a state satisfactory to the Emigration Commissioners, and where, in the probable event, which actually happened, of the executory contract going off, he had the whole benefit of the goods for himself.

I am not to consider whether the present verdict was satisfactory, or whether a contrary verdict might not have been equally or more satisfactory, the rule not having been granted as on a verdict against evidence,

which I individually was inclined, at the time of the motion, to think was the real question, and as to which I have formed no decided opinion: but it is sufficient for the decision of *this rule* to say that *I am not satisfied that there was no evidence to go to the jury*. And, in so deciding, I do not intend in the least to interfere with the rule of law, now so perfectly well settled, that these questions are pure questions of contract and credit, which, like all other questions of goods sold or work done, are, where there is any evidence, to be decided by the jury, who are to take into their consideration all the circumstances of the case.

Rule discharged.

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DOE on the demise of BENJAMIN AGAR and
ROBERT ROBINSON ROCLIFFE *against* JAMES
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EJECTMENT for lands in *Yorkshire*.

On the trial, before Lord *Campbell* C. J., at the last *Yorkshire* Summer Assizes, a verdict was found for the plaintiff, subject to a case, the material parts of which were as follows.

Henry Duncombe, being seised in fee of the premises in question, devised them to his nephew *Thomas Duncombe* for his life, remainder to trustees to preserve contingent remainders, remainder to the use of the first son of the body of the said *Thomas* in tail male, with remainders over, and died seised in 1818. *Thomas Duncombe*, the tenant for life, entered, and died on 7th

Where a party, entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested estate carved out of the remainder; stat. 4 Ann. c. 16, s. 9. making the

conveyance as effectual as if attornment had been made by the tenant of the particular estate.

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December 1847, leaving Thomas Slingsby Duncombe his eldest son.

By indenture of 28th *October* 1820, between the said *Thomas Slingsby Duncombe* of the 1st part, *Edward Cullingworth* of the 2d part, *William Lee* of the 3d part, and *William Hall*, a trustee for *Cullingworth*, of the 4th part, after reciting various money lending transactions among the parties of the first three parts, in consideration of a certain agreement between them, and of the delivering up of certain indentures relating to the transactions, and for other considerations, "and also for and in consideration of the further sum of 10*s.* by the said *William Hall* to the said *Thomas Slingsby Duncombe* paid, he the said *Thomas Slingsby Duncombe* granted, bargained, sold and demised unto the said *William Hall*, his executors," &c. the premises so devised by *Henry Duncombe*, to have and to hold the same unto the said *William Hall*, his executors, &c., "from the day next before the day of the date of the said indenture, for the term of ninety nine years thence next ensuing, but subject nevertheless and without prejudice to the life estate and interest of the said *Thomas Duncombe*," on trusts to secure payment of an annuity of 440*l.* granted by *Thomas Slingsby Duncombe* to *Edward Cullingworth*, with a proviso for the cesser of the term on payment in full.

By indenture of 26th *February* 1821, between *Thomas Slingsby Duncombe* of the 1st part, *Thomas Knight* of the 2d part, *John Wilson* of the 3d part, the said *Edward Cullingworth* of the 4th part, and the said *William Hall* of the 5th part, inter alia, for the considerations therein mentioned, and for securing the payment of an annuity of 125*l.* (which, by a deed recited in the case, had been assigned by *Thomas Slingsby Duncombe* to *Hall*, in trust

for *Knight, Wilson and Cullingworth*), *Thomas Slingsby Duncombe* "did grant, bargain, sell and demise unto the said *William Hall*, his executors," &c., the premises devised by *Henry Duncombe*, "to hold the same unto the said *William Hall*, his executors," &c., for the term of ninety nine years from the day next before the date of the said indenture, if the said *Thomas Slingsby Duncombe* should so long live, subject nevertheless to the life estate and interest of *Thomas Duncombe*, in trust to secure payment of the annuity of 125*l*.

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By indenture of 4th *September* 1822, between *Thomas Slingsby Duncombe* of the 1st part, *Thomas Knight* of the 2d part, *Edward Cullingworth* of the 3d part, and *William Hall* of the 4th part, *Thomas Slingsby Duncombe* granted, bargained, sold and demised unto the said *William Hall*, his executors, &c., all the premises devised by *Henry Duncombe*, to have and to hold the same unto the said *William Hall*, his executors, &c., for the term of ninety nine years from the day next before the date of the said indenture, if the said *Thomas Slingsby Duncombe* should so long live, subject to the life estate and interest of *Thomas Duncombe*, in trust to secure payment of an annuity of 165*l*. granted by *Thomas Slingsby Duncombe* to *William Hall*, in trust for *Knight* and *Cullingworth*.

By indenture of 28th *October* 1822, between *Edward Cullingworth* of the 1st part, *William Hall* of the 2d part, and *John Hearon* of the 3d part, reciting the indenture of 28th *October* 1820, in consideration of 990*l*. paid by *Hall* to *Cullingworth* for the purchase of one fourth part of the annuity of 440*l*., and of 10*s*. paid by *Hearon* to *Cullingworth*, *Cullingworth*, at *Hall's* request, bargained, sold and assigned to *John Hearon*, his executors, &c., "the said annuity of 440*l*., together with the said indenture, to have and hold the said annuity and other the

1853. premises" unto *Hearon*, his executors, &c., from the day of the date of the indenture, for the life of *Thomas Slingsby Duncombe*, upon trust for *Edward Cullingworth* as to three fourths and for *William Hall* as to one fourth.

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The case then set out the will of *William Hall*, of which *Joseph Agar* and *William Champney* were executors and trustees; and stated the death of *Champney* in *Hall's* life time, and the death of *Hall* on 15th June 1828; and also set forth an indenture of 2d August 1828, by which all legal and equitable interest in the annuities and estates which had belonged to *William Hall* then deceased were conveyed by *Joseph Agar* (in execution of the trusts contained in *Hall's* will) to *Thomas Gregory* and *George Lawton*, their executors, &c.

By indentures of lease and release of 20th and 21st May 1829, the release being made between *Thomas Slingsby Duncombe* of the 1st part, *George Earl of Chesterfield* of the 2d part, and *William Eaton Mousley* and *Charles Clarke* of the 3d part, *Thomas Slingsby Duncombe* conveyed all his estates in *Yorkshire*, subject to the life estate of *Thomas Duncombe* and to the several charges then affecting the same, to and to the use of *Mousley* and *Clarke*, their heirs, &c., by way of mortgage, for securing to the *Earl of Chesterfield* 53,847*l.*: and *Thomas Slingsby Duncombe* covenanted to levy a fine with proclamations; which was duly levied in *Trinity Term* 1851.

By indenture of 20th November 1830, between *Thomas Gregory* and *George Lawton* of the 1st part, *Joseph Agar* of the 2d part, *William Hutchinson Hearon* of the 3d part, *John Wilson* and *William Taite* of the 4th part, *Edward Cullingworth* of the 5th part, *Joseph Bilton Wilson* of the 6th part, and *Richard Wormald* of the 7th part, after reciting the indenture of 28th October 1820, the inden-

ture of 28th *October* 1822, the will of the said *William Hall*, his death and the proof of his will by *Joseph Agar*, the indenture of 2d *August* 1828, the death, as the fact was, of the said *John Hearon* on the 11th *July* 1828, and the appointment by his will of the said *William Hutchinson Hearon* as his executor, and the proof of the same will, and a certain agreement, it was witnessed that, in pursuance of the said agreement and in consideration of 1000*l.* to the said *Thomas Gregory* and *George Lawton* paid by the said *John Wilson* and *William Taite*, with the consent and approbation of the said *Joseph Agar*, being the full consideration for the purchase of the said fourth part or share of the said annuity of 440*l.*, *Thomas Gregory*, *George Lawton*, *Joseph Agar* and *William Hutchinson Hearon*, according to their respective estates, rights and interests in the said annuity and premises, bargained, sold and assigned unto the said *Joseph Bilton Wilson*, his executors, &c., all the said annuity of 440*l.*, and all the estate, right, title, interest, trust, possession, property, possibility, claim and demand whatsoever, as well legal as equitable, of them the said *Thomas Gregory*, *George Lawton*, *Joseph Agar*, *William Hutchinson Hearon* and *Edward Cullingworth*, or any of them, of, in, to or out of the said annuity and premises or any of them, or any part thereof, respectively, upon trusts therein mentioned: "and, for the considerations therein before mentioned, the said *Thomas Gregory*, *George Lawton*, *Joseph Agar* and *William H. Hearon*, according to their respective estates, rights and interests in the premises, and at the request and by direction of the said *Edward Cullingworth*, and at the nomination and appointment of the said *Edward Cullingworth*, as well as of the said *John Wilson* and *William Taite*, bargained, sold and assigned unto the said *Richard Wormald*, his executors," &c., the messuages

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and other premises in and by the said indenture of 28th *October* 1820 granted and demised, and all the estate &c., at law and in equity, of them the said *Thomas Gregory, George Lawton, Joseph Agar* and *William Hutchinson Hearon*, every or any of them, of, in or to the same premises. To have &c. the said premises unto the said *Richard Wormald*, his executors, &c., upon trusts as therein mentioned.

The said *Joseph Agar*, by his will dated 24th *December* 1841, and two codicils thereto, dated respectively 30th *January* 1844, and 31st *July* 1846, all duly executed and attested, appointed *Benjamin Agar* and *Robert Robinson Rockliffe* (the lessors of the plaintiff) and *Joseph Peart* his executors. He died on 13th *January* 1847; and the said will and codicils were duly proved on 12th *February* 1847 by the said lessors of the plaintiff, *Peart* having renounced probate.

In *February* 1843, the said *Richard Wormald* died, having made his will, by which he appointed *Harriet Wormald* his sole executrix; who, on 17th *March* 1843, proved his said will. The said three annuities of 440*l.*, 125*l.* and 165*l.* were duly paid by the said *Thomas Slingsby Duncombe* up to 1st *January* 1834, when they fell in arrear. The said *Edward Cullingworth* died in *December* 1841, leaving *William Singleton* his executor. In *Hilary Term* 1848, the said *Harriet Wormald* brought an action of ejectment to recover the said premises, and obtained judgment, and received the rents due on *Lady day* 1848, and for some time afterwards.

On 5th *June* 1848, the said *Thomas Slingsby Duncombe*, in obedience to a decree of the High Court of Chancery bearing date 14th *April* 1848, executed a disentailing deed of the said lands, tenements, hereditaments and premises to the said *William Eaton Mousley* and *Charles*

Clarke, and their heirs, to hold the same, subject to the several charges and incumbrances affecting the same at the time of the execution of the said indenture of mortgage of 21st *May* 1829, to and to the use of the said *William Eaton Mousley* and *Charles Clarke*, their heirs and assigns for ever, subject to the equity of redemption then subsisting in the said premises.

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By indenture of 1st *July* 1849, made between the said *Benjamin Agar* and *Robert Robinson Rockliffe* of the 1st part, *William Singleton* of the 2d part, *William Gray*, *John Kirlaw* and *John Singleton* of the 3d part, the said *John Singleton* of the 4th part, *Thomas Knight* of the 5th part, *Thomas Bulmer* of the 6th part, *Elizabeth Wallis* of the 7th part, *Thomas Slingsby Duncombe* of the 8th part, the *Earl of Chesterfield* of the 9th part, and *William Eaton Mousley* and *Charles Clarke* of the 10th part, after reciting, amongst other things, that the said *William Eaton Mousley* and *Charles Clarke*, in pursuance of the powers for that purpose vested in them by the said indentures of 21st *May* 1829 and 5th *June* 1848, and at the request and by the direction as well of the said *Thomas Slingsby Duncombe* as of the said *Earl of Chesterfield*, had caused all the premises to be put up for sale by public auction, and that the said annuity of 165*l.* was then vested in the said *Benjamin Agar* and *Robert Robinson Rockliffe*, as executors of the said *Joseph Agar*, the executor of the said *William Hall*, in trust for the several persons parties thereto of the 2d, 3d, 4th, 5th, 6th and 7th parts, and that there was a sum due for arrears, and that the said *Benjamin Agar* and *Robert Robinson Rockliffe*, at the request and by the direction of the several parties thereto, had agreed to accept, for the repurchase and in full satisfaction of the said annuity

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and of the arrears thereof, 4097l. 18s. 10d.: it was witnessed that, for the considerations therein mentioned, they the said *Benjamin Agar* and *Robert Robinson Rockliffe*, with the privity of the said *Thomas Slingsby Duncombe* and the *Earl of Chesterfield*, and by the direction &c., assigned and surrendered to the said *William Eaton Mousley* and *Charles Clarke* the said demised premises, and all the estate, right, title, interest, term and terms of years, claim and demand, both at law and in equity, of them the said *Benjamin Agar* and *Robert Robinson Rockliffe*, in, to, out of or upon the same premises, to the intent that all the residue which was then unexpired of the said term of ninety nine years, and all other, if any, the estate, term and interest of them the said *Benjamin Agar* and *Robert Robinson Rockliffe* in the premises, might be merged and extinguished in the reversion, freehold and inheritance, and be for ever thenceforth freed and absolutely discharged of and from all the trusts of the said indenture of 4th *September* 1822.

By another indenture of 1st *July* 1849, to which the said *Harriet Wormald*, *Thomas Slingsby Duncombe*, *William Eaton Mousley* and *Charles Clarke*, *George Earl of Chesterfield*, *Thomas Wood Wilson* and others were parties, after reciting and witnessing as therein contained, it was witnessed that the said *Harriet Wormald*, with the privity of the said *Thomas Slingsby Duncombe*, *George Earl of Chesterfield*, *Thomas Wood Wilson*, and several other parties thereto, assigned and surrendered to the said *William Eaton Mousley* and *Charles Clarke* the said demised premises, to the intent that all the residue which was then unexpired of the said term of ninety nine years created by the said indenture of 28th *October* 1820 might be merged and

extinguished in the reversion, freehold and inheritance thereof, and be for ever thenceforth freed and absolutely discharged of and from all the trusts of the said indenture of 28th October 1820.

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By indenture of 3d July 1849, made between the said *William Eaton Mousley* and *Charles Clarke* of the 1st part, the said *Earl of Chesterfield* of the 2d part, *John Dalton* and *John Dalton* of the 3d part, the said *Thomas Slingsby Duncombe* of the 4th part, *James Brown* (the defendant) of the 5th part, and *John William Tottie* of the 6th part, the said *William Eaton Mousley* and *Charles Clarke*, with the privity and approbation of the said *Thomas Slingsby Duncombe* and *George Earl of Chesterfield*, for the valuable considerations therein mentioned, conveyed all the said estates of *Copgrove, Brearton, &c.* (being, amongst others, the premises devised as before mentioned by the said will of the said *Henry Duncombe*), to the said defendant *James Brown* and his heirs, to such uses as *James Brown* should appoint, and, in default of appointment, to him and his assigns for life, remainder to the use of *Tottie*, his executors, &c., in trust for *Brown* during his life, remainder to the use of *Brown* and his heirs.

Actual entry was made by the lessors of the plaintiff on the premises previously to the commencement of the action.

Each party to be allowed to refer to any of the deeds, instruments and probates of the wills which relate to the matter of this case; and which were to be taken as part of the case. Memorials and inrolments of all such of the before mentioned deeds and instruments respectively as by law were required to be registered and inrolled were duly registered and inrolled.

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The said *Thomas Slingsby Duncombe* is still living.

The question for the Court to decide is, Whether the verdict should be entered for the lessors of the plaintiff or for the defendant.

The case was argued in last *Easter* Term (a).

Matthews Serjt., for the plaintiff. The interest in the land created by the indenture of 26th *February* 1821 is now an existing legal term for ninety nine years in possession, and is vested in the lessors of the plaintiff, as representing *Joseph Agar* the executor of *William Hall*, the original trustee. The deed of 2d *August* 1828 did not transfer from *Agar* those estates in which *Hall* was a mere trustee; and it is not disputed by the other side that, if this interest is a subsisting legal term, it is vested in the lessors of the plaintiff. But they make three points. First, they say that the interest created by the indenture of 28th *October* 1820 is a prior legal interest still subsisting, and consequently that the lessors of the plaintiff cannot recover in ejectment; Secondly, that the interest created by the indenture of 26th *February* 1821 merged in that created by the indenture of 4th *September* 1822, which last mentioned interest was surrendered by the lessors of the plaintiff by the deed of 1st *July* 1849, conveying the annuity of 165*L*, which the term of 4th *September* 1822 was created to secure. Thirdly, that the general words used in the first deed of 1st *July* 1849 operated as a surrender of all legal interest whatsoever belonging to the lessors of the plaintiff. In considering these questions, the date of the death of *Thomas Duncombe* is material. He died in 1847; before that date *Thomas Slingsby Duncombe* had no legal

(a) *May* 3d and 5th, 1853; before Lord *Campbell* C. J., *Wightman*, *Erle* and *Crompton* Js.

estate in possession; he was but tenant in tail in remainder. Being so, he could not grant a term of years in possession; and each of the three deeds of 28th *October* 1820, 26th *February* 1821, and 4th *September* 1822, operated, not as a grant of a term in possession, but as passing an *interesse termini*. An *interesse termini* does not become an actual term in possession till the person entitled to it enters. The *interesse termini*, created by the deed of 28th *October* 1820, passed by various mesne conveyances to *Harriet Wormald*, who, in 1848, recovered in ejectment. She, by the second indenture of 1st *July* 1849, surrendered her interest, which had then become a term in possession, to *Mousley* and *Clarke*, the persons in whom the immediate reversion was then vested; and it was then merged and gone. It will be said that, if the interest created by the deed of 26th *February* 1821 still subsists, it was a remainder immediately expectant upon the term of *Harriet Wormald*, and consequently would prevent the merger of that term in the subsequent estate of *Mousely* and *Clarke*. That might be so, if the interest of the lessors of the plaintiff had then been a legal term; but until entry, which completes the lease, there was but an *interesse termini*; *Watkins on Conveyancing*, by *Preston*, p. 203, 4th edition: and "an *interesse termini* will not prevent a merger of two estates, expectant on each other, though it be interposed between them;" 3 *Preston on Conveyancing*, 120 (3d edition); and p. 121-124, where *Salmon v. Swann* (a) is commented on. In the same book, p. 207, it is laid down generally that an *interesse termini* will neither cause nor prevent a merger. The interest conveyed to *Hall* by the deed of 4th *September* 1822 was no legal estate, as it was not perfected by entry; *Chatfield v. Parker* (b), *Miller v.*

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(a) *Cro. Jac.* 619.(b) 8 *B. & C.* 543.

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Green (a). Even if it could operate under the Statute of Uses, there is no election that it should; *Haigh v. Jaggard (b)*. And the interest created by the deed of 26th *February* 1821 could not merge in a *mère* *interesse termini*. Lastly, as to the supposed release by the general words of the first deed of 1st *July* 1849. The object of that deed, as appears by the recitals in it, was to convey the annuity of 165*l.*, and to put an end to the term of 4th *September* 1822. That being so, the general words will be restrained by the recitals.

Cowling, *contra*. The interest which passed from *Thomas Slingsby Duncombe* to *William Hall* by the three deeds was, in each case, a legal term in its inception. *Thomas Slingsby Duncombe* had, at the time he executed those deeds, a vested remainder in tail. In each of them there is a valuable consideration; and even the nominal consideration from *Hall* is sufficient to pass a use. The passages, cited on the other side from *Watkins* and from *Preston*, are quite accurate when applied to leases at common law by a person in possession. In such a case, entry was required to complete the lessee's title; but, at common law, the lease by a remainderman or reversioner did not operate as a lease; it operated as a grant of part of the remainder or reversion. The grantee had no power to enter; and his grant was perfected, not by entry, but by the attornment of the tenant in possession. And this distinction is pointed out in *Watkins on Conveyancing*, by *Preston* (4th edition), p. 204, where (after the passage cited from p. 203 by the other side) it is said: "So a grant of a term by a person who has a reversion or remainder, may be a present and immediate estate, capable

(a) 8 *Bing.* 92. S. C. 2 *Cr. & J.* 142.

(b) 16 *M. & W.* 525. See *Haigh v. Jaggard*, 3 *Exch.* 54.

of enlargement, before entry." At common law, then, the deed of 28th *October* 1820 would have been a grant of so much of the reversion, imperfect unless *Thomas Duncombe* the tenant for life attorned, but on his attornment complete. And now, since stat. 4 *Ann.* c. 16., attornment is supplied; note (4) to *Thursby v. Plant* (a). But the deed would also operate as a conveyance under the Statute of Uses. In *Watkins on Conveyancing*, by *Preston* (4th edition), p. 16, it is said: "A term also created by bargain and sale (unless from the form of the limitation it is an *interesse termini*) vests immediately and becomes an actual estate on the execution of the bargain and sale." In the present case, the operative words of the deeds are the ordinary words of a bargain and sale. In 2 *Preston on Conveyancing*, (2nd edition) p. 228, the authorities are collected; and it is said: "From the cases to which reference has been made, it was easily to be collected that a particular estate for years might be created by bargain and sale, and neither entry, attornment, or enrolment was essential to the efficacy of this assurance. The bargain and sale passed an use, and the use was executed by the statute of 27 *Henry VIII.* for transferring uses into possession, and the use became a term, in other words, an actual estate; and the bargainee was without entry, precisely in the same circumstances as a lessee at the common law was after entry or attornment:" except as to the right to maintain trespass. The effect of a deed granting a term out of a reversion is explained in 4 *Bac. Abr.* 846 &c. (7th ed.), tit. *Leases* (N), *Com. Dig. Attornment* (L). The result is that each of the three terms was a legal estate in its first inception; and, if that be so, it seems to be conceded that, being at one and the

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(a) 1 *Wms. Ssund.* 234 a.

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same time in *Hall*, the two prior legal estates would merge in the last of the three terms. But, even supposing they were not actual estates, still the acceptance of a second *interesse termini* for the same term as a previous one operates as an extinguishment of it; *Co. Litt.* 338. a.; note (2) to the same passage in the 11th edition (printed in *Hargrave* and *Butler's* edition); *Ive's Case* (a), *Sir Moyle Finch's Case* (b). But, if for any reason the terms were not merged in each other, the first term, created by the deed of 28th *October* 1820, is outstanding, as, on that hypothesis, it was not surrendered by *Harriet Wormald* by the second deed of *July* 1st 1849 to *Mousley* and *Clarke*; for, though it was intended to be a surrender, the existence of an intervening estate prevents it from operating as one; and it operates as a conveyance. Lastly, the term vested in the lessors of the plaintiff was surrendered by the first deed of *July* 1st 1849, to which the lessors of the plaintiffs were parties. By it they surrendered to *Mousley* and *Clarke*, who were then owners of the legal estate in the inheritance, "all the estate, right, title, interest, term and terms of years, claim and demand, both at law and in equity, of them" in the premises. These words are quite large enough to include the term granted by the deed of 26th *February* 1821. It is true that, by the recitals in the deed, it appears that the principal object was to purchase the annuity secured by the deed of 4th *September* 1822, and that there was no intention to convey the annuity secured by the deed of 26th *February* 1821. But, though there was no intention to purchase all the annuities, it was an object of the deed to get in all the legal estate; and the general words should not be restrained so as to frustrate that secondary object. As to the cases of *Miller v.*

(a) 5 *Rep.* 11 a.(b) 6 *Rep.* 63 a. 69 b.

Green (a) and *Haigh v. Jaggard* (b), cited on the other side, they both turned upon the point of pleading and on the doctrine of election, which is here immaterial.

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Matthews Serjt., in reply. It is true that a reversion may be conveyed: but, if a term of years be carved out of a reversion and conveyed, the ordinary incidents of a lease for years attach. The Statute of Uses requires that there shall be a party seised to the use; *Watkins on Conveyancing* (4th ed., by *Preston*), 137, 237, 238. [Lord *Campbell* C. J. But, supposing this so, what effect on the interests in the terms of years would be produced by *Thomas Slingsby Duncombe* becoming tenant in tail in possession, in 1847?] That would not convert an *interesse termini* into a lease in possession, unless the lessee necessarily took by way of use; but, in default of an express limitation by way of use, or election, whatever may operate at common law will so operate; *Haigh v. Jaggard* (b), *Miller v. Green* (a). Further, as the terms came to *Agar*, the lessor of the plaintiff, not by the act of parties, but by operation of law, there would be no merger by their coming together in him. It is true that an acceptance of a term by one already in possession of a term has the effect of a surrender of the entire term; but that applies only to leases in possession. Stat. 4 Ann. c. 16. s. 9. has no application. The attornment which that statute supplies takes effect according to the interest which the landlord, the party to whom the attornment is made, had at the time. But here the termor had not an interest which could be perfected by attornment, so as to become an interest in possession. The terms were created to secure the annuities, not to give the parties possession. [Lord

(a) 8 Bing. 92. S. C. 2 Cr. & J. 142.

(b) 16 M. & W. 525.

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Campbell C. J. One would suppose the words "bargain and sale" to be introduced for the very purpose of introducing the effect of the Statute of Uses.] That is foreign to the object of the parties to the transaction; and the Court will look to that object; *Goodtitle dem. Edwards v. Bailey (a).*

Cur. adv. vult.

Lord CAMPBELL C. J., in this Term (June 13th), delivered the judgment of the Court.

In this case the argument turned upon the question whether certain deeds, purporting to be demises for ninety nine years, made by Mr. *Thomas Slingsby Duncombe* whilst tenant in tail in remainder of the premises in question, and in the lifetime of his father, tenant for life of the same premises, operated by way of interesse termini only, or created an estate in the premises.

In order to make out any case on the part of the lessors of the plaintiff, it was necessary for them to establish that the deeds in question operated merely by way of interesse termini, and not so as to create any estate. If they operated as a conveyance of part of the remainder, the plaintiff's case would be answered in two ways. First, the lease of 26th *February* 1821, on which this ejectment was brought, would be merged in the subsequent term of the 4th *September* 1822, by the same lessor to the same lessee. And, secondly, if the plaintiff's lease were kept alive, the legal title under it could not vest in possession, because a prior term of years of the 28th *October* 1820 would have been prevented from merging in the inheritance under a deed of 1st *July* 1849, by reason of the plaintiff's term intervening between such prior term and the inheritance. If the

(a) 2 *Coop.* 597. 600.

plaintiff's term was in existence as a term at the time of the intended surrender of 1st *July* 1849, that deed could not have operated as a surrender, but would have operated as a grant of the prior term to the owners of the inheritance; and such prior term, not merging, by reason of the plaintiff's term intervening, would bar the right of the lessors of the plaintiff under their term.

To prevent such effect of the terms, the plaintiff was obliged to contend that the deeds operated only by way of contract to pass an *interesse termini*, and that, in the absence of any election, they could not have passed any estate under the Statute of Uses, but must be taken as operating at common law. And that no estate was created under them until the entry made under the one on which an ejectment was brought, and the possession recovered by *Harriet Wormald*, and until the lessors of the plaintiff entered under their lease before the present ejectment.

Several nice questions were argued as to what might have been the result if those deeds had operated by way of *interesse termini*, and as to how far they might have operated under the Statute of Uses. But we think that we are not called upon to decide any of these questions; as we are of opinion that the deeds operated as a conveyance of part of the remainder under which an estate for years was carved out of the remainder, and vested at once in the respective lessees, by virtue of the Statute of *Anne*, which gives operation to such deeds in the same manner as if an actual attornment had taken place.

At common law, reversions and remainders, lying in grant and not being capable of being perfected by livery, as in the case of the grant of a freehold, or by entry in the case of the grant of a leasehold interest, required, for many purposes, an attornment of the tenant of the par-

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ticular preceding estate: but, where such attornment was obtained, the reversion or remainder, or the estate carved out of it, vested so as to give the grantee the right to the rents and services attached to the reversion, and, since stat. 32 H. 8. c. 34., to sue on any covenant running with the reversion. The effect of this doctrine with regard to leases carved out of the reversion or remainder is very distinctly stated in *Bac. Abr. tit. Leases (N) (a)*. If the grantees of such leases could not obtain an attornment, they might at their election treat the grant as an *interesse termini*: but, where they obtained the attornment, the grant operated as a conveyance of so much of the reversion. The statute of 4 Ann. c. 16. s. 9. now makes all grants of manors or rents, or of the reversion or remainder of any messuages or lands, effectual to all intents and purposes, without any attornment of the tenants of the manors or of the lands out of which the rent shall be issuing, or of the particular tenants upon whose estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

We must therefore consider these deeds as grants of interests out of a remainder to which the tenants of the preceding estates have attorned: and the case then falls directly within the rule—as laid down in the passage in *Bacon's Abridgment*: and we must hold that the estates passed by way of grant of the terms carved out of *Thomas Slingsby Duncombe's* remainder, and vested at once in the lessees.

The foundation of the plaintiff's case therefore failed: and our judgment must be for the defendant.

Judgment for the defendant.

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THOMAS ANDREWS *against* WILLIAM HAILES.*Tuesday,*
*May 24th.***EJECTMENT** for certain buildings and land situate in *Essex*.

Defendant appeared for all the premises mentioned in the writ. On the trial, before *Coleridge J.*, at the last Spring assizes for *Essex*, evidence was given that the premises in question consisted of a bakehouse, barn and stable. The defendant had been tenant from year to year, for twenty three or twenty four years, first to the plaintiff's father, who died in 1847, and then to the plaintiff, of a farmhouse with appurtenances. This property extended to a high road, on the other side of which was waste land open to the road. More than twenty years before the commencement of this action, the defendant took in a small portion of this waste land, opposite to the farm house which he held, and on the other side of the road and immediately adjoining to it. He built upon the land so taken in by him a bakehouse and offices, which he occupied along with, and as part of, the farm offices: and the land so built upon constituted the premises now in dispute. The defendant had held the whole ever since, paying no additional rent. He was always rated for the premises in question, and, also, was always rated separately for the premises which he originally held of the plaintiff's father. In *July* 1850, the plaintiff gave the defendant notice to quit

A tenant encroached on waste land, not belonging to his landlord, separated from his holding only by a road. He built on the encroachment, and continued to occupy it, as a part of his holding and ancillary to the occupation thereof, for more than twenty years. He then gave up the original holding to his landlord, but claimed to retain the encroachment as his own. In ejectment by the landlord: Held: that an encroachment made under such circumstances is, as between landlord and tenant, to be presumed to be part of the holding: that it rested on the defendant to shew by other facts that the encroachment was not made

as part of the holding; and that the mere intervention of the road did not rebut the *prima facie* presumption.

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“the house and premises, with the appurtenances, situate” &c., “which you hold of me as tenant thereof.” The defendant, at the expiration of the notice, gave up to the plaintiff the premises which he had originally taken, but refused to give up possession of the land which he had taken in from the waste: and for this land the action was brought. The counsel for the defendant contended that the plaintiff shewed no title, and that defendant had acquired a right to the premises by twenty years’ possession. The learned Judge directed a verdict for the plaintiff, if the jury believed the above facts and were satisfied as to the identification of the premises (as to which there was some dispute). Verdict for plaintiff. Leave was given to move to enter a verdict for defendant on the objection taken: the Court, if it was a question of fact, to draw such inferences as a jury ought to draw.

In last *Easter* term, *M. Chambers* obtained a rule *Nisi* accordingly.

Shee Serjt. and *H. Hawkins* shewed cause (a). The fair inference from the facts is that the defendant made the encroachments on behalf of his landlord, intending to annex them to the premises which he held as tenant to the landlord, and treating the whole as one connected property. *Doe dem. Lloyd v. Jones* (b) is a strong authority for the plaintiff. The land enclosed by the tenant was there, as here, separated from the tenant’s farm only by a road; that cannot be considered to interrupt the contiguity. And it was there held that the legal presumption is, that the encroachment is made for the

(a) The case was heard partly on *May* 23d, and concluded on this day.

(b) 15 *M. & W.* 580.

benefit of the landlord, though the presumption may be rebutted. *Bryan dem. Child v. Winwood* (a), *Doe dem. Challnor v. Davies* (b), *Doe dem. Lewis v. Rees* (c), *Doe dem. Dunraven v. Williams* (d), *Doe dem. Harrison v. Murrell* (e), all support this doctrine. The cases on this point were cited in the argument in *Doe dem. Baddeley v. Massey* (g); but the Court there held that the conduct of the parties shewed that there was no intention of uniting the parcels: the presumption was therefore rebutted. Here nothing was shewn to rebut the presumption. The smallness of the addition accounts for there being no additional rent: and in *Doe dem. Lloyd v. Jones* (h) Alderson B. said that the circumstance was immaterial. The plaintiff's claim cannot be affected by the separate payment of rates, a transaction to which he was not privy, and of which indeed he was not shewn, nor was likely, to have any knowledge. Then, if the land in question was held with the premises demised, the Statute of Limitations has no effect; because the plaintiff's right to the whole first accrued on the expiration of the notice.

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M. Chambers and *Prentice*, in support of the rule. It is not a presumption of law that wherever a tenant encloses land it must under all circumstances be for the benefit of his landlord. It certainly would not be so when the enclosure was in a distant part of the country. There are, no doubt, some circumstances under which, according to the decided cases, the tenant does enclose

(a) 1 *Taunt.* 208.(b) 1 *Esp. N. P. C.* 461.(c) 6 *C. & P.* 610.(d) 7 *C. & P.* 332.(e) 8 *C. & P.* 134.(g) 17 *Q. B.*(h) 15 *M. & W.* 584.

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for his landlord: as, however, it is not so in all cases, that must be a question of fact. [*Coleridge J.* No question was left to the jury upon this point; but leave was reserved to enter the verdict on the understanding that, if it was a question of law, the Court should decide, and, if a question of fact, the Court should draw the proper inferences from the undisputed facts.] The decisions are almost all cases at Nisi prius. [*Lord Campbell C. J. Bryan dem. Child v. Winwood (a)* was the first case; there the lessor of the plaintiff was lord of the manor, and had therefore a right to approve. The tenant had enclosed part of the waste; and, as that act was illegal unless done for the lord, it might well be held that *primâ facie* it was done for him. But, when the land enclosed belongs to a third person, it does seem strange that the landlord should be supposed to authorize his tenant's theft.] In most, if not all, of the cases the landlord was the freeholder of what was enclosed. In *Doe dem. Lewis v. Rees (b)* the enclosed land was between the farm and the sea shore, joining the two, and therefore *primâ facie* belonged to the owner of the farm. In *Doe dem. Lloyd v. Jones (c)*, it is true, the lessor was not owner of the waste; but in that case there was an agreement endorsed on the lease that what was encroached should belong to the landlord. [*Lord Campbell C. J.* I think, as at present advised, that an agreement, by which the tenant was to remove his neighbour's landmark for the benefit of the landlord, was illegal; and that such an agreement, amounting to a conspiracy to cheat his neighbour, could not whilst executory be enforced: but it may be another question

(a) 1 *Taunt.* 208.

(b) 6 C. & P. 610.

(c) 15 M. & W. 580.

how far, after it was executed, the tenant might be precluded from denying that it was part of the holding.] In most cases the slips of land enclosed are parcels beside the road: the presumption arising in such a case is discussed in *White v. Hill* (a). [Coleridge J. There have been, I believe, several cases in which encroachments, made on the land of third persons, have as between landlord and tenant been held to belong to the landlord; but I do not know that they have been discussed in banc, or got into the books of reports.]

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LORD CAMPBELL C. J. I am of opinion that the verdict entered for the plaintiff must stand. I think it must be considered that the encroachment in this case was held by the defendant as part of the demised premises; and, that being so, I think the defendant is not at liberty to deny that it was part of them. I proceed on what the civil law calls *exceptio personalis*, and the common law an *estoppel*, and say that the tenant cannot deny this. I do not adopt the doctrine that the tenant steals for his landlord, and that therefore the landlord, at the end of the demise, is entitled to claim the stolen property; but I think that, when the property is taken and used as part of the holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises. The strange doctrine, as to stealing for the benefit of the landlord, originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste. In such cases it might well be presumed that the tenant approved

(a) 6 Q. B. 487.

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for the benefit of the lord who had a right to approve : but the idea that he could steal the land of another for his landlord is revolting to me, as it was to my predecessor Lord *Kenyon* (a). In the present case, it appears that the defendant got possession of the encroachment by virtue of being tenant of the demised premises, and that he occupied it as part of these premises. They were adjoining; for there was nothing intervening but the road. The manner in which the property was rated goes for nothing, as there was no evidence that the plaintiff was aware of it.

COLERIDGE J. I have but little to add : but I think it important to observe that, in my opinion, the presumption is one depending on the inference to be drawn from the facts. It is the tenant's duty to preserve his landlord's boundary : if, at the end of the term, that boundary has been confused by enclosing adjacent ground, a very strong presumption arises that the enclosed land is part of the holding : and the tenant is not entitled to meet it by shewing that, though he occupied the enclosure as part of the holding, it was an encroachment. But, when it appears that the case is of this nature, all the facts must be weighed. The contiguity of the premises or their separation ; the unity of occupation or not : all facts of that kind are to be weighed. If, for instance, the buildings on the encroachment had been occupied for the purpose of carrying on a trade quite unconnected with the occupation of the farm demised to the defendant, that would

(a) See *Doe dem. Colclough v. Mulliner*, 1 Esp. N. P. C. 460.

have been a fact to be weighed. In the present case there is nothing to rebut the presumption: the premises were contiguous; for the intervention of a right of way is not as if land in the occupation of a third person had intervened: and the occupation of the buildings on the encroachment was always ancillary to the holding of the farm. I have therefore no hesitation in drawing the inference of fact, that, as against this defendant, the premises belonged to the plaintiff.

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ERLE J. From the decided cases, I infer the law to be that, when the power to encroach is derived from the occupation of the premises held from a landlord, and the encroachment is occupied as if it was a part of the holding, then, at the end of the tenancy, the presumption, as between the landlord and tenant, is that it is part of the holding, and it belongs to the landlord. I think there are many reasons why this should be so; amongst others, I think the encroachment ought not to be permitted to belong to the tenant, a wrong-doer. It is true that, for technical reasons, stealing land is not larceny: but it is morally a theft; and it ought not to enure to the benefit of the thief.

CROMPTON J. I think that, where a tenant encloses small portions of land adjoining to his holding, the presumption is that he makes the enclosure part of his holding; and, unless there be other facts shewing the contrary, it is at the end of the tenancy the property of the landlord. In *Doe dem. Lewis v. Rees (a) Parke B.*

(a) 6 C. & P. 610.

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says: "It is clearly settled that encroachments made by a tenant are for the benefit of his landlord, unless it appears clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent." That I think is accurate. The intervention of the road was held to make no difference in *Doe dem. Lloyd v. Jones (a)*. In the present case there is nothing to rebut the ordinary presumption; and therefore I think the premises are to be considered part of the holding, and belonging to the plaintiff.

Lord CAMPBELL C. J. added: The result seems to be that, in the opinion of this Court, where the encroachment is on soil not the property of the landlord, the presumption should be stated to be that the encroachment is part of the holding: not that the tenant encroached for the landlord.

Rule discharged.

(a) 15 M. & W. 580.

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The QUEEN against WELCH Esquire and another. *Wednesday, May 25th*

MELLOR, in last Term, obtained a rule calling on *Frederick Isaac Welch* and *William Wills* Esquires, two of the justices for the borough of *Birmingham*, and *Robert Whittaker*, to shew cause why the said two justices should not hear, determine and adjudicate upon the matter of the information and complaint of *Thomas Foxall Griffiths*, on behalf of himself and his copartners, against the said *Robert Whittaker*.

From the affidavits on which the rule was obtained, it appeared that, on 18th *January* 1853, *T. F. Griffiths* exhibited an information, and obtained a summons thereon, against *R. Whittaker*, in pursuance of which both *Whittaker* and *Griffiths* appeared, on 22d *January*, before Mr. *Welch* and Mr. *Wills*, justices of the borough of *Birmingham*. The information charged that, on 2d *December* then last, *Whittaker*, "tin-plate-worker, by agreement in writing of that date, for and in consideration of the wages therein agreed to be paid by the said *T. F. Griffiths*, *Jacob Bright Browett* and *George Goodman* the younger to the said *R. Whittaker*, did contract with the said *T. F. Griffiths*, *J. B. Browett* and *G. Goodman* the younger to serve them as a handi-

W., by written agreement, in consideration of 3*l.* advanced to him by *G.* at the time of execution, and the wages agreed to be paid to him by *G.*, agreed to work for and serve *G.* as a tin-plate-worker, and to serve no one else without *G.*'s consent in writing for twelve months, and also until the expiration of three months after notice by *W.* to *G.* of his desire to determine the service; and *W.* agreed to fulfil his said service, and not to absent himself during customary hours of work; and *G.*, in consideration of *W.*'s services, agreed to pay *W.* on *Saturday* in every week during

the aforesaid term such wages as articles made by *W.* should amount to at their usual workmen's prices. Proviso that, if after the expiration of twelve months either party should give to the other three months' notice of desire to determine the service, the service should cease and the agreement be void after the expiration of the time mentioned in the notice. And *W.* authorized *G.* to deduct 2*s.* per week until the loan of 3*l.* should be paid.

Held: that the agreement shewed liability on the part of *G.* to provide *W.* with work so long as the service continued, and was not void for want of mutuality, and might be enforced under stat. 1 *G.* 4. c. 34. s. 3.

And, the magistrates having refused to adjudicate, this Court made absolute a rule ordering them to adjudicate.

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craftsman, to wit as a tin-plate-worker, for the term of twelve months from the said 2d day of *December* last, and that the said *R. Whittaker* did enter upon such service accordingly, and did afterwards, to wit on the 17th day of *January* instant, at the said borough where the said *R. Whittaker* was then and there employed, and unlawfully, before the term of his said contract was completed, without the said *T. F. Griffiths, J. B. Browett* and *G. Goodman* the younger's consent, and without just excuse, absent himself from the said service of his said masters; and hath from thence neglected to fulfil his said contract: contrary to the statute" &c.

The agreement was produced upon the hearing. The material parts were as follows.

"Agreement made, this 2d day of *December* 1852, between *Robert Whittaker*, of" &c., "of the one part, and *T. F. Griffiths, J. B. Browett* and *G. Goodman* junior, of" &c., "manufacturers and copartners, of the other part, as follows."

"The said *R. Whittaker*, in consideration of the sum of 3*l.* lent and advanced to him by the said *T. F. Griffiths, J. B. Browett* and *G. Goodman* junior, at the time of the execution hereof, and of the wages hereinafter agreed to be paid to him by the said *T. F. G., J. B. B.* and *G. G.* junior, doth hereby agree to work for and serve the said *T. F. G., J. B. B.* and *G. G.* junior, their executors, administrators and assigns, as a tin-plate-worker, and not to work or serve any one else without their leave or consent given in writing, from the date hereof during and until the full term of twelve months thence next ensuing, and also for, during and until the expiration of three calendar months after notice by him the said *R. Whittaker* given to the said *T. F. Griffiths, J. B. Browett* and *G. Goodman* junior,

of his desire and intention to determine the said service. And the said *R. Whittaker* doth hereby further agree to fulfil his said service and perform his work in a good, skilful and workmanlike manner, in all things, and not to absent himself during the usual and customary hours of work. And the said *T. F. Griffiths, J. B. Browett* and *G. Goodman* junior, in consideration of the good and faithful services of the said *R. Whittaker*, to be performed as aforesaid, do hereby agree to pay unto the said *R. Whittaker*, on the *Saturday* night in every week, during the aforesaid term (usual holidays excepted), all such wages as the articles made by the said *R. Whittaker*, as aforesaid, shall amount to at their usual workmens' prices for similar articles. Provided always that, if (after the expiration of twelve months from the date hereof) either of the said parties shall give to the other or others of them three calendar months' notice of his or their desire to determine the said service, then, after the expiration of the time mentioned in such notice, the said service shall cease, and this agreement shall be void, except only as to any remedy for every breach. The said *R. Whittaker* hereby authorizes the said *T. F. Griffiths, J. B. Browett* and *G. Goodman* junior to deduct the sum of 2*s.* per week until the above loan of 3*l.* be lawfully paid." (Signed by *Griffiths, Browett, Goodman* and *Whittaker*.)

The magistrates, upon the production and proof of this agreement, declined to adjudicate, stating that they considered the agreement to be void for want of mutuality and for uncertainty.

Alfred Wills now shewed cause. The magistrates thought that they had no jurisdiction to enforce this agreement, inasmuch as it contains no contract, express

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or implied, that the master should find work for the servant; so that the agreement is not a contract within stat. 4 G. 4. c. 34. s. 3. That there is no express contract to that effect is clear: and, from *Young v. Timmins* (a), it appears that no such contract can be implied, and that this renders the whole an agreement without consideration. The test suggested in the case cited was, whether the party employed could have sued the other party for not providing work: and it was held that he could not. The decision has, indeed, been questioned, but upon a different point. In *Pilkington v. Scott* (b) it was held that the agreement contained a contract to employ: but there a stipulation was inserted to pay 8*l.* per annum absolutely, besides a provision that a moiety only of the wages should be paid during a depression of the trade, and that when the workman was sick or lame the employers might employ another: and from thence an undertaking to employ was inferred. It is true that some of the Bench there laid a stress on the provision for a month's notice, and there is a provision for notice here: but the value of that circumstance seems to have been estimated by its connection with the other facts of the particular case. In *Aspdin v. Austin* (c), *Dunn v. Sayles* (d) and *Rust v. Nottidge* (e) the question was not identical with the present; for there the contract, which it was sought to infer, was one to permit the party to remain in the service for a certain time, not to find employment. The same remark applies to *Elderton v. Emmens* (g).

(a) 1 Cr. & J. 331.

(b) 15 M. & W. 657.

(c) 5 Q. B. 671.

(d) 5 Q. B. 685.

(e) 1 E. & B. 99.

(g) 6 Com. B. 160, in Exch. Ch., reversing the judgment of C. P. in *Elderton v. Emmens*, 4 Com. B. 479. Judgment of Exch. Ch. affirmed in Dom. Proc. after the decision of the case in the text (12 Aug. 1853); *Emmens v. Elderton*, 4 H. L. Ct.

But Lord *Denman's* remark in *Aspdin v. Austin* (a) is important. "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." In *Williamson v. Taylor* (b) the party retained endeavoured to recover for non-employment, on an agreement like this, and failed. What would be a sufficient employment? [Lord *Campbell* C. J. What a jury, under the circumstances, thought reasonable.] *Lees v. Whitcomb* (c) and *Sykes v. Dixon* (d) shew that such an agreement is void for want of mutuality. It would seem to have been understood, in *Hartley v. Cummings* (e), that, in the case of want of mutuality, the agreement falls also within the objection of being in restraint of trade. And, that being so, the nominal consideration of an allowance of 3*l.* will not support the agreement; per *Alderson* B. in *Hitchcock v. Coker* (g).

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Mellor, contra, was not called upon.

LORD CAMPBELL C. J. The objection to the agreement has been very perspicuously put; and the Court is much obliged to the learned counsel for the argument which he has addressed to us. But I am clearly of opinion that the agreement is valid. It is said to be invalid, because it throws no obligation on the employer

(a) 5 Q. B. 684.

(b) 5 Q. B. 175.

(c) 5 Bing. 34.

(d) 9 A. & E. 693.

(e) 5 Com. B. 247.

(g) 6 A. & E. 438. 447. See pp. 456, 457.

1853. to provide work. But it seems to me that it would be unreasonable to adopt this construction. The servant agrees to work for the master, and for no one else, for twelve months, and until three months' notice shall be given. In consideration of that, the master agrees to pay, on the *Saturday* in every week, all such wages as the articles made shall amount to at their usual price. Then comes a proviso, that, if after the expiration of twelve months either shall give to the other notice of his or their desire to determine the service, the service shall cease after the expiration of the time mentioned in the notice, and the agreement be void. Is there not here a necessary implication that the employer shall find reasonable work, and pay for the articles manufactured? Are we to suppose a most unreasonable intention, such as never could have entered into the mind of either party? The necessity of giving notice clearly shews that there is some obligation on the employer. What was that? To find reasonable employment according to the state of the trade. That is not an unilateral agreement, but a mutual agreement with something to be done on each side. This view does not conflict with the authorities. On the contrary, it agrees with *Pilkington v. Scott* (a), a case directly in point. This therefore, being a good agreement, and within the statute referred to, ought to be enforced; and the magistrates have jurisdiction.

COLERIDGE J. I am of the same opinion. Every case of this sort depends on circumstances of its own: as long as we do not decide upon contradictory principles

(a) 15 M. & W. 657.

there is nothing in the fact of our arriving at opposite results in different cases. We must treat this agreement as containing the words of both parties, and give to those words a reasonable construction. The agreement contemplates that the relation of employer and employed shall continue for twelve months and until the expiration of three months' notice; that is, for fifteen months at least. It would be strange if the relation were to continue and the workman not to be paid. If there were a stipulation for paying a salary, one could understand it: but here the stipulation is only for payment for the articles manufactured, at certain prices. Besides this, there is an advance of 3*l.*, a loan in fact, to be repaid out of the wages to become due, at 2*s.* per week. How can there be a deduction if nothing becomes due? The necessary implication is that the master is to find work. But it is enough for us to say that the contract is not void: the particular construction is for the magistrate.

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CROMPTON J. (a). I am of the same opinion. We should be deciding almost in the teeth of *Pilkington v. Scott* (b) if we held this agreement void for want of mutuality. It was there considered that sufficient appeared in the agreement to shew the master's liability to find employment. All that is said there appears to me to be good law: I should be sorry to throw any doubt upon it. I think that nobody but a lawyer, on reading this agreement, could doubt that the meaning was that the master was to find employment. What my Lord and my brother *Coleridge* have said is unanswerable.

(a) *Erie J.* was absent on account of a domestic calamity.

(b) 15 *M. & W.* 657.

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There is to be payment every week. The implication is, I think, stronger in this case than in *Pilkington v. Scott* (a).

Rule absolute (b).

(a) 15 M. & W. 657.

(b) See *Regina v. Lord*, 12 Q. B. 757.

Thursday,
May 26th.

MEREDITH against MEIGH and others.

Goods, of above the value of 10*l*, were verbally ordered to be shipped consigned to *The A. Co.* at *Liverpool*. *The A. Co.* were carriers by inland navigation to the residence of the vendee. The goods were shipped on board the *M.*, a vessel selected by the vendor; a bill of lading was signed, making the goods deliverable to *The A. Co.* at *Liverpool*, and was forwarded to them; of all which the vendee had notice, and did and said nothing. Then the goods perished at sea on their voyage to *Liverpool*; and the vendee refused to have any thing to do with them. The above facts being proved in an action for goods sold and delivered, leave was reserved to enter a verdict for plaintiff, if these facts were evidence on which the jury would have been justified in finding an acceptance and receipt within sect. 17 of the Statute of Frauds.

ACTION for goods sold and delivered. Plea: General traverse of the declaration. Issue thereon.

At the trial, before *Crompton J.*, at the last *Bodmin* assizes, it appeared that the defendants were manufacturers of earthenware at the *Potteries* in *Staffordshire*. The plaintiff was resident in *Cornwall*. On 12th April 1850, the defendants, at *Handley* in *Staffordshire*, verbally ordered from a person of the name of *Close*, who was the agent of the plaintiff there, a cargo of china stone clay to be sent by sea by the plaintiff, consigned to *The Anderton Carrying Company, Liverpool*, for the defendants, and to be insured by plaintiff on their account. The ordinary

Held. 1. That the shipment on board a vessel selected by the vendor and the signature of a bill of lading making the goods deliverable to the vendee's agent, though a sufficient delivery to support an action for goods sold and delivered, was not sufficient to bind the contract. 2. That the receipt of the bill of lading by *The A. Co.* (they being carriers only), and the non-feasance of the vendee on hearing that the goods had been shipped, were not, under the circumstances, sufficient evidence to justify the jury in finding a verdict for the plaintiff. *Scmble*: That the acceptance and retention of a bill of lading, by the consignee, may be equivalent to an actual receipt of the goods.

mode of transmitting clay from *Cornwall* to the *Potteries* is by sea to the *Mersey*, and thence by inland navigation to the *Potteries*. *The Anderton Carrying Company* are public carriers on the inland navigation, from the *Mersey* to the *Potteries*, as was well known to all the parties. No vessel was named at the time the order was given. *Close* wrote to his principal, the plaintiff, advising him of the order, and received an answer to the effect that the order should be complied with, and the cargo sent by the sloop *Marietta*, and the bill of lading sent to *The Anderton Carrying Company*; but that there were no facilities for effecting an insurance in *Cornwall*, and that the purchasers had better effect the insurance themselves, which *Close* communicated to the defendants. Inclosed either in this letter or in a subsequent one, it did not on the evidence appear clearly which, was a copy of the bill of lading, expressing that the goods were shipped on the 18th *April* deliverable to the order of *The Anderton Carrying Company, Liverpool*. This was not signed by the master (probably, it was suggested, because the shipment was not then complete), and seemed to be sent for the information of *Meigh & Co*. *Close* wrote to *The Anderton Carrying Company*, inclosing the unsigned copy of the bill of lading, and instructing them, when they should receive the bill of lading itself, to act upon it and forward the cargo to *Meigh & Co*. at *Handley*. The shipment was complete on the 22d *April*; and the bill of lading, which was then signed, was sent by the plaintiff to *The Anderton Carrying Company* by post. The sloop *Marietta* sailed on 22nd *April*, and was lost at sea, with her cargo on board, on 26th *April*. There was no distinct evidence of the precise dates at which *The Anderton Carrying*

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Company received the bill of lading, and at which the defendants received the communications. They were sent by post: and, though the letters produced at the trial bore post marks, these were illegible; and the course of post from *Cornwall* to *Liverpool* and *Staffordshire* appeared not to be very regular: but there was evidence from which it might be inferred that the bill of lading had been received by *The Anderton Carrying Company* on 26th *April*, before the vessel was lost, and that the defendants at the *Potteries* had, on 25th *April*, received notice that the bill of lading was forwarded to *The Anderton Carrying Company*. On 4th *May*, the plaintiff received intelligence that the vessel was lost, and sent notice of this fact to the defendants, which notice was received by the defendants on the 5th *May*. They then refused to have anything to do with the cargo; which was the first thing which it was shewn that they had done after giving the order. The value of the cargo was 83*l*.

On these facts it was objected that there was nothing to bind the contract within the 17th section of the Statute of Frauds, 29 *C. 2. c. 3*. Neither party asked to have any specific question left to the jury: and the learned Judge directed a verdict for the defendants, with leave to enter a verdict for the plaintiff for 83*l*, if this Court should be of opinion that there was any evidence of an acceptance and receipt, on which the jury would have been justified in acting. *Butt*, in *Easter Term*, obtained a rule *Nisi* accordingly.

Slade, *Smirke* and *Maynard* now shewed cause. It is important to bear in mind the very words of the 17th section of the Statute of Frauds: "except the buyer

shall accept part of the goods so sold, and actually receive the same." In the present case there is no pretext for saying that the defendants themselves received any portion of the goods; the plaintiff's case must rest either on the receipt of the goods on board the *Marietta*, or on the receipt by *The Anderton Carrying Company* of the bill of lading, which is for some purposes the symbol of the goods. First: as to the receipt by the master of the sloop *Marietta*. It is to be observed that the verbal order was to send the goods by sea; but no vessel was named. It was left to the vendor to select what vessel he liked. A delivery to a carrier, even if selected by the vendor, is a delivery to the purchaser, if there is otherwise a binding contract: but the receipt by a carrier, even though selected by the purchaser, is not sufficient to bind the contract within the statute; *Hanson v. Armitage* (a), *Acebal v. Levy* (b), *Johnson v. Dodgson* (c). The contrary was ruled in *Hart v. Sattley* (d); but that case was always considered to be overruled, until it was mentioned, apparently with approbation, in the judgment of this Court in *Morton v. Tibbett* (e). Then the receipt of the bill of lading was after the loss of the goods; and it is not possible that there should be an actual receipt of a non-existing thing. (On examining the note of the learned Judge, it appeared that there was some evidence, as stated above, that the bill of lading would, in course of post, be received in *Liverpool*, before the loss of the vessel on the same day.) The bill of lading is the symbol of the property. The receipt of the symbol cannot be an "actual" receipt of the goods;

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(a) 5 B. & Ald. 557.

(b) 10 Bing. 376.

(c) 2 M. & W. 653.

(d) 3 Campb. 528.

(e) 15 Q. B. 428, 440.

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Farina v. Home (a). [Erle J. Suppose the person who has received the bill of lading were to sell it, whilst the goods were yet at sea, and so transfer the property. Would not that be an actual receipt of the goods?] The retention of the symbol would be evidence of an acceptance of the goods; *Farina v. Home* (a); and, if there was a dealing with the goods by the purchaser, or by some one under the authority of the purchaser, that would be sufficient evidence of actual receipt; *Morton v. Tibbett* (b), *Bushell v. Wheeler* (c). And it may be that any actual dealing with the symbol, the bill of lading, so as to alter the property in the goods before they perished at sea, would have precluded the defendants from setting up as a defence that the goods, which they had dealt with as owners, had not vested in them. But, though they might, in such a case, be precluded from saying there was no actual receipt, it is not easy to see how there could really be an actual receipt consistently with *Farina v. Home* (a). [Crompton J. In *Farina v. Home* (a) the purchaser received a wharfinger's delivery warrant; and the Court give this as the ground of their judgment. "This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who" in that case was "the vendor's agent), and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and

(a) 16 M. & W. 119.

(b) 15 Q. B. 428.

(c) 15 Q. B. 442, note.

then only is there a constructive delivery to him." It may be made a question, whether there is not a difference in this respect between the assignee of a delivery order, and the original consignee of a bill of lading. May it not be said that, though the orders were given by the vendor under a parol contract, and consequently not binding on the vendee, yet, that the bill of lading was an offer on the part of the captain to hold as bailee for the vendee, and that the retention of the bill of lading by the vendee is an acceptance of that offer, equivalent to the attornment of the wharfinger to the assignee of the delivery order. Lord *Campbell* C. J. If the vendees choose in such a case to make the contract of sale good, they may sue the captain on the contract in the bill of lading without any further act on the captain's part.] That question does not arise; for the bill of lading was never received or dealt with by the defendants, or by any one having authority to bind the bargain on their account. It was transmitted by the plaintiff's agent *Close* to *The Anderton Carrying Company*, and received by them as agents to forward. Had *The Anderton Carrying Company* received the goods themselves, instead of the symbol, it would not have bound the bargain.

Butt and *Montague Smith*, in support of the rule. The bill of lading was sent to the vendee's agent, and was not returned. That is evidence of dealing with the goods as owner, which is evidence of acceptance and receipt; *Morton v. Tibbett* (a). [Lord *Campbell* C. J. *The Anderton Carrying Company* were agents to forward

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(a) 15 Q. B. 428.

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the goods, and no more. Where is the evidence that the defendants exercised any dominion over the goods?] They had notice of the fact that the bill of lading had been forwarded to *The Anderton Carrying Company*, who were, if not agents to accept, at all events agents to receive the goods. Their silence is evidence that they accepted the bill of lading. [*Coleridge J.* If it was their duty to say anything, their silence would be important. But I do not see that they were called upon to say or do anything.]

LORD CAMPBELL C. J. I am of opinion that there was no evidence on which the jury would have been justified in finding that any part of the goods in this case were accepted and actually received. The first consideration is, whether, where no ship is named by the vendee, but the goods are ordered to be sent by sea, the mere delivery on board a ship unnamed by the vendee, and the signing by the master of that ship of a bill of lading to carry the goods for the vendee, is a sufficient acceptance and receipt. I think it is not, and that the case of *Hart v. Sattley* (a) must be considered overruled and not law. That being so, the mere shipment on board the sloop *Marietta*, and the signing of the bill of lading by which the goods were, pursuant to the verbal orders of the defendants, made deliverable to *The Anderton Carrying Company*, are not enough to satisfy the statute. What are then the other circumstances? That the bill of lading was forwarded to *The Anderton Carrying Company*, and received and kept by them. That could be no evidence of an acceptance and receipt

(a) 3 Campb. 528.

by the defendants; for *The Anderton Carrying Company* were mere carriers having no authority to accept and receive the goods. But, on a day, which I think we must for the purposes of this rule take to be the 25th *April*, the defendants had notice of the shipment, and that a bill of lading had been forwarded to *The Anderton Carrying Company*; and they did nothing till they heard of the loss of the vessel, on, as we must take it, the 5th *May*. And the question comes to be: Is the silence and nonfeasance of the defendants, from 25th *April* to 5th *May*, enough to prove that the defendants had constituted the captain of the *Marietta* their agent to accept and receive the goods, though he was not so before? I think it is not enough; for, as my brother *Coleridge* forcibly remarks, what were they called upon to say or do? Their inaction did not cause the others to alter their position at all. There are no other facts in the case. I think our decision is in conformity with all the cases except *Hart v. Sattley* (a), which I consider not law. In *Bushel v. Wheeler* (b) the vendee ordered the goods to be sent by a particular ship; and they were so sent and left lying in the warehouse of the owner of that ship for five months, with the vendee's knowledge. That was evidence that the vendee had constituted the owner of the ship, who had been agent to carry, his agent to keep the goods; and, if he had done so, he had received them himself. So in *Morton v. Tybbett* (c) the vendee resold the goods, and altered the destination of the goods in the carrier's hands: and that also was held evidence of a receipt. *Farina v. Home* (d) is an authority directly against the plaintiff.

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(a) 3 *Campb.* 528.(b) 15 *Q. B.* 442, note.(c) 15 *Q. B.* 428.(d) 16 *M. & W.* 119.

1853. I am therefore of opinion that this rule must be discharged.

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COLERIDGE, J. I am of the same opinion, as I think that the plaintiff gave no evidence which would justify the jury in finding that the defendants accepted and actually received those goods. I think it will be best to consider the material facts by steps. The goods were, pursuant to the verbal orders of the defendants, delivered on board a ship chosen by the vendor; and a bill of lading was signed making them deliverable to *The Anderton Carrying Company*. Now it is clear, on the authorities, that, whatever was the agency of *The Anderton Carrying Company*, or even if they had themselves been the vendees, there was not yet either an acceptance or a receipt of the goods. But the bill of lading was sent on to *The Anderton Carrying Company*, and received by them. It now becomes material to see what kind of authority they had; and it appears that they were mere agents to forward; so that their receipt of the bill of lading comes to nothing. But the defendants had notice of all these facts; and they did nothing. Now, whenever a party has notice of facts which call upon him to act, forbearing to act is very important; but, in the present case, by the original verbal contract the vendor was to choose the ship by which the goods were to be sent to *The Anderton Carrying Company*; and, when the defendants received notice that the vendor was doing this, they were not called upon to do anything, so that their nonfeasance is not of any weight. I think that, if the bill of lading had been received by the defendants themselves, especially if they had dealt with it, the case might have been different.

ERLE J. The question reserved for our opinion is, Whether there was evidence on which the jury would have been justified in finding that the defendants had accepted part of the goods sold, and actually received the same? And I answer it in the negative. Placing goods ordered on board ship is good evidence of a delivery in support of a count for goods sold and delivered; but that is not the same as the question under the 17th section of the Statute of Frauds. I have no doubt that the bill of lading, which is the symbol of the property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself: but in the present case the defendants neither acted, nor led the plaintiff to believe that they acted, as if they had received the goods, or were owners of them.

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CROMPTON J. The question reserved was, not Whether there was any evidence for the jury, but Whether a verdict for the plaintiff would have been justified. It is clear that a delivery to a carrier is a sufficient delivery in an action for goods sold and delivered, but not enough within the 17th section of the Statute of Frauds. *Hanson v. Armitage (a)* is now always considered to lay down the law correctly. Then the question comes to be, Whether the communication to the defendants of the fact of shipment and transmission of the bill of lading to *The Anderton Carrying Company* and the silence of the defendants make any difference. These facts were such as the vendees who had given the order must have expected to take place; and therefore they were not called on to

(a) 5 B. & Ald. 557.

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say anything on receiving notice that they had taken place. Where goods, or the indicia of the property in goods, remain long under the controul of the vendee, especially where the vendee has in any respect acted as owner of the goods, there may be sufficient evidence of an acceptance and receipt, although the goods themselves are not received. But in the present case there are no facts of that kind, on which the jury would have been justified in finding a verdict for the vendors.

Rule discharged.

Friday,
May 27th.

MARY EVATT *against* JOHN HUNT.

Plaintiff declared on a bond executed by defendant, and

DECLARATION on a bond by defendant for 300*l.* to be paid to plaintiff, subject to a condition,

set out the condition : which recited that a female, *M. A. H.*, had intermarried with defendant : that, in contemplation of and previously to the marriage, personal estate belonging to *M. A. H.* was, by settlement, assigned to trustees for the benefit of *M. A. H.*, defendant and the children of the marriage ; that *M. A. H.* received, before her marriage, from plaintiff, a principal sum of 300*l.*, to the interest of which plaintiff was entitled for life, *M. A. H.* being entitled to the principal on plaintiff's decease ; that the 300*l.* was paid to *M. A. H.* with plaintiff's consent, on condition that the interest should be regularly paid to plaintiff ; that, to effect such purpose, defendant and *M. A. H.* had agreed to execute to plaintiff the bond in manner after appearing ; and the condition was that, if defendant or *M. A. H.* should during plaintiff's life pay plaintiff the interest, and in case of plaintiff's death between days of payment pay a proportion of the interest to plaintiff's executors, the bond should be void. Breach : non-payment of the interest.

Plea : That, before the making of the bond and the marriage, plaintiff was possessed of the 300*l.* for life, and entitled to the interest for life, and to the 300*l.* absolutely, in the event of the plaintiff surviving *M. A. H.* : and that plaintiff did, at the request of *M. A. H.* and defendant, pay and assign to *M. A. H.* the 300*l.* and all plaintiff's interest therein, on condition that *M. A. H.* and defendant should secure to plaintiff an annuity for plaintiff's life, equal to the amount of the interest of the 300*l.* : that *M. A. H.* and defendant, in consideration of plaintiff so paying and assigning the 300*l.*, agreed to secure to plaintiff the said annuity : and the bond, with its condition, whereby the annuity was secured to the plaintiff, was made to plaintiff to defendant and *M. A. H.* in pursuance of the said condition on which the 300*l.* was so paid, and in fulfilment of the agreement ; that the bond was made after the passing of stat. 53 G. 3. c. 141. ; and the annuity was granted on a pecuniary consideration, to wit the payment of the 300*l.* ; and no memorial of the bond was enrolled within thirty days : whereby the bond was void.

On demurrer : held, that plaintiff was entitled to judgment, it not appearing that this was the grant of an annuity within the meaning of the statute.

whereby, after reciting that *Mary Ann Hunt* had then recently intermarried with defendant, and that, previously to and in contemplation of such marriage, certain personal estate, then belonging to *M. A. Hunt*, was, under and by virtue of a certain indenture of settlement executed previously to such marriage, bearing date 6th *June* then last past, and made between defendant of the first part, *M. A. Hunt* (then *Mary Ann Evatt*) of the second part, and *William Hannen* and *James William Macklin* of the third part, assigned unto the said *W. Hannen* and *J. W. Macklin*, as trustees under such indenture of settlement, upon certain trusts, therein declared, for the benefit of *M. A. Hunt* and defendant and the children of the said marriage, as therein particularly mentioned; and also reciting that *M. A. Hunt*, before her marriage with defendant, received, of and from plaintiff, a certain principal sum of 300*L*, to the annual interest and income of which sum of 300*L* plaintiff was entitled during the term of her life, and to which principal sum *M. A. Hunt* was entitled on the decease of plaintiff; and also reciting that the said sum of 300*L* was paid over by and with the consent of plaintiff unto the said *M. A. Hunt* (then *M. A. Evatt*) on condition that such annual interest and income should be regularly paid to her, plaintiff, by equal half yearly payments, after the rate of 4*L* per cent. per annum, but that no legal security had been ever executed for the same; and also reciting that, in order to effect such last recited purpose, plaintiff had applied unto defendant and *M. A. Hunt*, to execute unto her the bond, which they had agreed to do in manner thereafter appearing: The condition of the above written bond or obligation was and is declared to be such that, if defendant, or *M. A. Hunt*, or either of

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them, or the heirs, executors or administrators of them, or either of them, should, during the life of plaintiff, well and truly pay unto her, or her assigns, interest upon the said principal sum of 300*l.* calculated after the rate of 4*l.* per cent. per annum, by half yearly payments, to be made on 12th *January* and 12th *July*, in every year, by equal portions, and clear of all deductions on any account whatsoever, and should make the first half yearly payment on 12th *January* next ensuing the date of the bond, provided plaintiff should be then living, and, in the event of the death of plaintiff between or in the interval of any of the said half yearly days of payment, and either before or after the 12th *January* then next, then if defendant and *M. A. Hunt*, or either of them, or the heirs, &c., should also well and truly pay unto the executors, administrators or assigns of plaintiff such part of the said interest as should be in the proportion to the time or number of days which, inclusive of the day of the decease of plaintiff, should have elapsed prior to her decease, and after the day of payment next and immediately preceding that event, and also if defendant and *M. A. Hunt*, or either of them, or the heirs, &c., should make the payment of such proportionate part of the said interest as soon after the decease of plaintiff as demand should be made thereof by the executors, administrators or assigns of plaintiff, and clear of all deductions whatsoever, then the said bond or obligation should be void &c. Plaintiff then assigned, for a breach of the condition, that, after the making of the bond, to wit on 12th *July* 1852, a large sum &c., to wit 6*l.*, became due to plaintiff, and still was in arrear and unpaid, contrary to the form &c.; and, for a further breach, that, on 12th *January* 1853, a further sum of 6*l.*

became due to plaintiff and still was in arrear and unpaid, contrary &c. : by reason of which several breaches the bond became forfeited.

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Plea : That, before the making of the writing obligatory, and before the intermarriage of defendant with *M. A. Evatt*, plaintiff, being then possessed of the said sum of 300*l*., in the condition of the said bond mentioned, for her life, and being entitled to the interest of the said sum of 300*l*. for her life, and being further absolutely entitled to the said sum of 300*l*. in the event of her surviving *M. A.*, did, at the request of *M. A.* and of defendant, pay over and assign to *M. A.* the said sum of 300*l*., and all her, plaintiff's, right, title and interest therein, on the condition that *M. A.* and defendant should and would secure to plaintiff an annuity or yearly sum for the life of plaintiff, equal to the amount of the interest upon the sum of 300*l*. at the rate of 4 pounds by the hundred pounds by the year ; that is to say, the annuity or yearly sum of 12*l*. by the year : And *M. A.* and defendant, in consideration of plaintiff so as aforesaid, at their request, paying over and assigning the said sum of 300*l*. to *M. A.*, promised and agreed to and with plaintiff that they would secure to plaintiff the said annuity or yearly sum of 12*l*. for her life as aforesaid. That the said writing obligatory, with the condition thereunder written, whereby the annuity or yearly sum of 12*l*. is secured to plaintiff for her life, was made and delivered to plaintiff by defendant and *M. A.*, his wife, in pursuance of the said condition on which the said sum of 300*l*. was so paid over and assigned as aforesaid, and in fulfilment of the said agreement and promise of defendant and *M. A.* ; and that the said writing obligatory was made after the passing of a certain

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Act &c. (53 G. 3. c. 141.); and that the said annuity in the said condition mentioned was granted upon and for a pecuniary consideration, to wit the paying over and assigning, as aforesaid, by plaintiff, of the said sum of 300*l.* in which plaintiff was so interested as aforesaid: and that no memorial of the said writing obligatory was enrolled in the High Court of Chancery within thirty days after the execution thereof, according to the provisions of the said Act: whereby the said writing obligatory was and is null and void.

Demurrer. Joinder.

C. Manley Smith, for the plaintiff. This is simply a bond for securing the interest on a sum of which the plaintiff gives up the immediate possession in order to carry out a family arrangement. In *Winter v. Mouseley (a)*, where an attempt was made to treat such a bond as an annuity bond, *Best J.* said that he had "always understood the meaning of an annuity to be where the principal was gone for ever, and it is satisfied by periodical payments." Here the condition is simply for the payment of interest on the principal sum. In *Tetley v. Tetley (b)* a son, in consideration of his father and mother having given up to him a farm and stock worth 300*l.*, gave a bond for payment to them of 10*l.* annually: and it was held that this was not an annuity, within the meaning of the Acts.

Aspland, *contra*. It cannot be assumed, on these pleadings, that the bond was given as incident to a marriage settlement. The effect is that the plaintiff gives up the sum of 300*l.* in consideration of receiving

(a) 2 *B. & Ald.* 802, 806. See *Marriage v. Marriage*, 1 *Com. B.* 761.

(b) 4 *Bing.* 214.

12*l.* annually; that is a purchase of an annuity of 12*l.* for a pecuniary consideration. [*Crompton J.* Is the memorial to be filled up with a statement that the purchase money is 300*l.*?] The facts may be stated. [*Crompton J.* It would be a very anomalous statement.] *Hood v. Burlton (a)* is an authority in favour of the defendant. There a married woman, having stock in the funds settled to her separate use for life, in consideration of money advanced to her, assigned her interest in the funds to a trustee, upon trust to pay a certain portion of the dividends annually to persons named by the parties making the advance; the husband covenanting to make up any deficiency in case of the wife's death between the days of payment: and it was argued that this was merely a transfer of stock: but it was held to be a deed to secure an annuity. In the present case, if *Mary Evatt* survives *Mary Ann Hunt*, the effect of the transaction will be simply an assignment of the 300*l.* [*Erle J.* In *Hood v. Burlton (a)* there was direct pecuniary consideration, the payment of 400*l.* down.] Under stat. 53 *G. 3. c. 141.* it is enough if the consideration for the annuity be money's worth, as appears from sect. 10. Here the plea avers that the grant is of an annuity.

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C. Manley Smith, in reply. It is, in one sense of the word, a grant of an annuity: but not in the statutable sense. The statutes, which are in *pari materiâ*, were all passed with the object of protecting improvident persons from money-lenders: they have no connection with a transaction like this; *Blake v. Attersoll (b)*, where *Little-*

(a) 2 *Ves. Jun.* 29.(b) 2 *B. & C.* 875.

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 “ may be considered as virtually incorporated ” in stat.

Lord CAMPBELL C. J. I am of opinion that this is not a case within stat. 53 G. 3. c. 141. The point is decided by *Blake v. Attersoll* (a) and other cases, some of which have been cited. I approve of these decisions: and, if the question were *res integra*, I should take the same view. Although the preamble of stat. 17 G. 3. c. 26. is not copied into stat. 53 G. 3. c. 141., we must suppose that the Legislature had the same object in view in the two statutes: namely, to protect needy persons from the arts and extortion of money lenders. Now this transaction does not fall within the meaning of the Legislature, so understood. The plaintiff was entitled to the interest of the money during her life, and *Mary Ann Hunt* was entitled to the principal sum after the plaintiff's death; but the plaintiff, if she survived *Mary Ann*, was entitled to the principal. The money was not the money of the plaintiff; she had only a contingent interest in it: nor was even money's worth given: the plaintiff merely had the money to lay out so as to produce an income during her life; and this she does by allowing it to remain in the hands of the defendant, *Mary Ann Hunt's* husband. This has no resemblance to the purchase of an annuity requiring a memorial. As to *Hood v. Burlton* (b), it is completely explained by the remark of my brother *Erle*: that was the case of a purchase of an annuity for a sum of money. The plaintiff, therefore, is entitled to our judgment.

(a) 2 B. & C. 875.

(b) 2 Ves. Jun. 29.

COLERIDGE J. I am of the same opinion. The transaction, as stated in the plea, is that the plaintiff, being entitled to the income of 300*l.* for life, and also to the principal 300*l.* in the event of her surviving *Mary Ann*, consents to the placing the principal in the hands of the defendant, taking a bond to secure the payment of the income during her life. This is a transaction exactly within the principle of *Blake v. Attersoll (a)*, where 10,000*l.* was to be paid under a marriage settlement, but the party who was to pay died without making the payment: and the party beneficially interested agreed to take from the executors an annual payment of 125*l.* in lieu of 5000*l.* of the 10,000*l.*: and it was held that the annuity did not require enrolment. That case was, in my opinion, rightly decided, and governs the present.

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ERLE J. The principle to be extracted from *Blake v. Attersoll (a)* governs this case. This is not an annuity granted for a "pecuniary consideration," the words used in stat. 53 *G.* 3. c. 141. s. 2. In the column, in that section, headed "consideration and how paid," the examples given are both of money paid. In *Blake v. Attersoll (a)* the Court construed the transaction not to be one of borrowing money. The words in the 10th section, "pecuniary consideration or money's worth," do not appear to me to shew that the statute will apply to such a case as the present. That section excludes from the operation of the Act annuities granted without "pecuniary consideration or money's worth:" but it does not follow from this that the Act includes all that is granted for money's worth.

(a) 2 *B.* & *C.* 875.

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CROMPTON J. This was merely a family arrangement. The plaintiff could protect herself by keeping the money in her own hands: she waives her right to do so; and really that is all. We cannot call this an annuity, within the Act, unless we overrule *Blake v. Attersoll* (a). The annuity must be granted for money or money's worth, such as goods. But, in such an arrangement as this, neither money is given nor money's worth.

Judgment for plaintiff.

(a) 2 B. & C. 875.

Friday,
May 27th.

MARTIN MOORE *against* JOHN SHEPHERD, The
Deputy Master of The TRINITY HOUSE of
DEPTFORD STROND.

Stat. 32 G. 3.
c. 74. s. 14.,
exempting
coasting ves-
sels from pay-
ing the dues
to *Ramsgate*
Harbour in
respect of
more than one
voyage in the
year, includes
coasting ves-
sels carrying
only coal.

THIS was an action brought against defendant as deputy master of the *Trinity House, Deptford Strond*, for the recovery of 4*l.* 1*s.* And by consent of the parties, and by the order of *Platt B.*, according to The Common Law Procedure Act, 1852, a case was stated for the opinion of the Court without any pleadings, substantially as follows.

The defendant is sued as a nominal defendant, according to the provisions of stat. 32 G. 3. c. 74. s. 52. (a), on behalf of the Trustees of the harbour of *Ramsgate*, mentioned in that Act and in the several subsequent Acts of Parliament relating to the said harbour, viz.

(a) "For the maintenance and improvement of the harbour of *Ramsgate*, in the county of *Kent*; and for cleansing, amending, and preserving the haven of *Sundwich* in the same county." Not printed at length in the Statutes at Large.

37 *G. 3. c. 86.*, 55 *G. 3. c. lxxxiv. (a)*, all of which are to be referred to as part of this case.

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Stat. 32 *G. 3. c. 74.* recites the passing of Acts of Parliament in 22 *G. 2. (b)* and 5 *G. 3. (c)*; and that the trustees named in the first of these Acts were thereby empowered to settle and impose certain rates and duties to be paid by the master or owner of every *British* or foreign ship, vessel, or crayer, of the respective burthens therein mentioned (except fishermen and coasters), for every loading, or discharging, or ship in ballast, from, to or by *Ramsgate*, and on every chaldron of coals or ton of grindstones, *Purbeck*, *Portland* or other stones, for the purposes mentioned in such recital; and further recites that, the revenue of the said trustees having of late exceeded the expenditure very considerably, and that the interest of a balance of 41,225*l. 3s.* cash unfunded at Midsummer then last invested in the public funds would, without the income arising from the money already vested therein, be much more than sufficient to provide for the growing payments of certain annuities (the whole whereof, amounting only to the sum of 943*l. 15s.*, from the advanced age of the annuitants might be expected to end in a few years); and further recites that, the Act of 22 *G. 2.* having been found defective, it was expedient that the same and the Act of 5 *G. 3.* should be wholly repealed, and a new Act passed for the purposes mentioned in such recital.

The said recited Act of 22 *G. 2.* and the recited Act 5 *G. 3. c. 82.* are to be taken as parts of this case.

By the first section of stat. 32 *G. 3. c. 74.* the recited Acts are repealed; and, by the 2d section, certain

(a) Local and personal, public.

(b) C. 40.

(c) C. 82.

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persons were appointed trustees for carrying the Act into execution.

Sect. 8 of stat. 32 G. 3. c. 74. is as follows: "And be it further enacted, that the said Trustees or any such fifteen or more of them as aforesaid, at a public meeting (previous notice whereof shall be given" &c.) "are hereby authorized to settle and impose the several rates and duties hereinafter mentioned, which rates and duties shall commence and become payable from and after the 25th day of *June* 1792 inclusive;" "that is to say, any rate or duty not exceeding 3*d.* per ton to be paid by the master or owners for every ship, vessel, or crayer, of the burden of twenty tons or upwards, and not exceeding the burden of three hundred tons, whether the same be laden or in ballast, passing from, to, or by *Ramsgate*, whether on the East or West side of the *Goodwin Sands*, or otherwise passing by or coming into the harbour there (other than and except ships laden with coals, grindstones, or *Purbeck, Portland*, or other stones), not having a receipt testifying his payment before on that voyage; and for every ship, vessel, or crayer which shall exceed the burden of three hundred tons any rate or duty not exceeding 1*d.* for each ton of such ship (except ships laden with coals, grindstones, *Purbeck, Portland*, or other stones) and for every chaldron of coals or ton of grindstones, *Purbeck, Portland*, or other stones, a rate not exceeding three halfpence; and the said duties shall be paid every time such ship, vessel, or crayer shall sail from, arrive, or come into harbour at or pass by *Ramsgate* as aforesaid (except as hereafter is mentioned); and such rates or duties, when settled by the said Trustees, shall be forthwith published in the *London Gazette*, for the information of all parties concerned, the same to be

paid to the customer or collector of the customs, or their deputies, or such other person or persons as shall be appointed by the Trustees of this Act to receive the same, in such port or place whence such ship, vessel, or crayer shall set forth, or where such ship, vessel, or crayer shall arrive, before she sails from such port on her outward-bound voyage, and before unloading the goods on board thereof on her homeward-bound voyage; the amount of the number of such tons to be ascertained according to the rules laid down by an Act passed" &c. (26 G. 3. c. 60.): "and that the rates and duties so to be levied and raised as aforesaid shall be applied, by or under the direction of the said Trustees, in or towards the enlarging, building, finishing, maintaining, and supporting and improving the said harbour of *Ramsgate*."

The 12th section enacts: "That no ship, vessel, or crayer outward bound, the place of whose destination shall be to or by *Ramsgate*, shall be cleared at the office of His Majesty's customs or subsidies on such outward-bound voyage, nor shall any vessel who shall have sailed from or by *Ramsgate*, or have gone into harbour there, be allowed to enter at the said office on her homeward-bound voyage by any officer or officers of His Majesty's customs, without producing a certificate from the officer or person empowered to collect the same, testifying the payment of the rates and duties imposed under the authority of this Act; and also that on producing a proper acquittance for the receipt thereof, such master or owner thereof shall have and be entitled to an allowance from the merchants, importers or exporters, as follows; that is to say, for every ton of goods loaden on board such ship or vessel on account of such merchants,

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1853. importers, or exporters a like sum per ton as is by this
MOORE Act charged upon the ship or vessel on board of which
v. such goods or merchandizes shall be laden, and so in
SHEPHERD. proportion for a less quantity than a ton."

The 14th section is as follows: "Provided always, and it is hereby declared, that no coasting vessel or fisherman shall pay the duty charged by this Act oftener than once in any one year, nor shall any collier returning in ballast from the *French* or *Flemish* coast, producing a certificate of having paid the duty on her outward-bound voyage for her cargo of coals, be liable to the payment of any such duty for her inward-bound voyage, any thing hereinbefore contained to the contrary notwithstanding."

Sect. 15 enacts: "That it shall be lawful for the collector or collectors, or any other person or persons authorized and deputed by the said Trustees to go on board any ship, vessel, or crayer, to demand, collect, and receive the said duties and rates by this Act due and payable, and for non-payment thereof to take and distrain every such ship or vessel, and all the tackle, apparel, and furniture thereto belonging, or any part thereof, and the same to detain and keep; and in case of any neglect or delay in payment of any of the said duties and rates for ten days after any distress so taken as aforesaid, that then it shall be lawful for the said collector and collectors, receiver and receivers of the said duties and rates, to sell the said distress, and therewith to satisfy him or themselves, as well for and concerning the duty so neglected or delayed to be paid for, and for which a distress shall be so taken as aforesaid, as also for his or their reasonable charge, in taking, keeping, and selling such distress, rendering to the master or other person

having the rule and command of the ship or vessel in or from which such distress shall be so taken the overplus, on demand, if any there shall be" (a).

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The 58th section, so far as is material to this case, is as follows: "That nothing herein contained shall extend or be construed to extend to charge with any of the rates and duties hereby granted and imposed any ship or vessel which shall be bound to or from the town of *Sandwich* in the said county of *Kent*, the whole or the major part of which ship or vessel shall belong to or be the property of any of the inhabitants of the said town" (in case the master &c. produce a certificate of ownership, as more particularly described), "but that all such ships or vessels shall and may pass to and from, by, into, and out of the said harbour of *Ramsgate*, without paying any of the said rates and duties."

The 69th, 70th and 71st sections contain similar exemptions in favour of vessels belonging to the ports of *Dover*, *Weymouth* and *Great Yarmouth*.

The duties imposed by the Trustees during the year 1852 were until 1st *October* three halfpence per ton, to be paid by the master or owner of every ship, vessel or crayer, *British* as well as foreign, of the burthen of

(a) Sect. 16 was referred to in argument. It enacts: "That if any master, commander, or owner of any ship, vessel, or crayer shall at any time before the commencement of this Act have eluded or avoided the duties payable under the said former Act, or shall at any time from the commencement of this Act elude or avoid, or attempt to elude or avoid, the payment of the duties hereby granted, by any method whatsoever, such master, commander, or owner of such ship or vessel shall stand charged with and be liable to the payment of the same, and the same shall be levied and recovered from such master or owner by the same method by which fines and penalties imposed by this Act are hereinafter directed to be levied and recovered."

1853. 20 tons or upwards, and not exceeding the burden of

MOORE 300 tons, except ships laden with coals, *Purbeck, Port-*
V. land or other stones; and for every chaldron of coals,
SHEPHERD. or ton of grindstones, *Purbeck, Portland* or other stones,
the rate of three farthings. And, on 1st *October* 1852,
the said duty of three halfpence per ton was reduced to
one penny and one eighth of a penny per ton; and the
said duty of three farthings per chaldron of coals, or ton
of grindstones, *Purbeck, Portland* or other stones, was
reduced to one halfpenny per chaldron of coals, or ton
of grindstones, *Purbeck, Portland* or other stones: and
the said reduced duties were in force on the said 1st
October, and thenceforth until the end of 1852.

The plaintiff is, and during the whole of the year 1852 was, the sole owner of a vessel registered at *Sunderland*, called the *Thomas and Margaret*, of the burthen of 179 tons, of which *John Hall* is master. The plaintiff's vessel is (and for five years last past has been) a collier employed solely in the coasting trade; and during the last five years she has been solely employed in carrying coals from *Sunderland* to *Portsmouth* and the ports in the immediate neighbourhood on the South coast of *England*, returning direct to *Sunderland* in ballast.

During the whole of 1852 she has been solely employed in carrying coals from *Sunderland* to *Southampton*, returning direct to *Sunderland* in ballast. On such voyages the said ship passed by *Ramsgate* on 19th *February* 1852. The sum of 13s. 6d., being at the rate of three farthings for every chaldron of coals on board the said vessel, was paid by the master thereof to the said Trustees for the said vessel passing by *Ramsgate* on

her voyage from *Sunderland* to *Southampton* laden with coals; that being the first voyage in which she had passed by *Ramsgate* during the year 1852. And a receipt was thereupon given to the master, testifying his payment of the said duty. (The case set out the receipt.) The said vessel afterwards in the same year made several other voyages from *Sunderland* to *Southampton*, passing by *Ramsgate*, laden, on each of such voyages, with coals; on each of which voyages similar payments were demanded in respect of the coals laden on board of the said vessel during that voyage, but were resisted by the said *John Hall*, as master of the plaintiff's vessel, on the ground that they could not legally be claimed more than once in each year.

The duties payable, if such duties were, under the circumstances aforesaid, chargeable on the said ship, or in respect of the said cargoes thereof, more than once in any year, amount to 4*l.* 1*s.*; and that sum has been paid by plaintiff to the trustees under protest. The duty due, if the same were not chargeable more than once in the same year, was 13*s.* 6*d.* if the same is to be calculated according to the cargo on board during the first voyage in that year; but is 1*l.* 2*s.* 4½*d.* if the same is to be calculated on the tonnage of the said vessel.

The questions for the opinion of the Court are :

First : Whether, in case of a coasting vessel performing during one year several coasting voyages from a port on the North coast to a port on the South coast of *England*, and on each voyage passing by *Ramsgate* as mentioned in the Act, laden with coals, the said Acts, or any of them, authorized the exaction of duty, in respect of such cargoes or otherwise, oftener than once in such one year.

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Secondly: If not, whether such one annual payment is to be calculated on the tonnage of the vessel, or on the first cargo during such one year.

If the Court shall decide the first question in the affirmative, then the judgment of the Court is to be entered for the defendant with costs &c. But, if the Court shall decide the first question in the negative, then the judgment of the Court is to be entered for the plaintiff for such amount as the Court shall, with reference to the second question, consider to have been over paid, with costs &c.

Sir *F. Kelly*, for the plaintiff. First: the duty was payable only in respect of one voyage in the year. Sect. 8 of stat. 32 G. 3. c. 74., but for the reference to the subsequent exceptions, would make all the duties payable upon every voyage: indeed they would be payable for every time of passing *Ramsgate*, were it not that the words "not having a receipt testifying his payment before on that voyage" must manifestly be incorporated with the mention of all three classes of ships, namely, the two classes of ships, distinguished according to their tonnage, not laden with coals, grindstones, or *Purbeck*, *Portland*, or other stones, and the third class, of ships so laden. The words "to be paid by the master or owners" must also be applied to all three classes. The exception, "except as hereafter is mentioned," follows the imposition of the duty on all three classes, and applies to all. One of those exceptions is afterwards specified in sect. 14, and must be read as if incorporated in sect. 8. The plaintiff's vessel is undoubtedly a "coasting vessel;" the question is whether, in this section, the word "coasting vessel" means "coasting vessel not being a

collier." Such a construction would probably exclude the greater part of the coasting trade from the benefit of the exemption. It will be suggested that vessels laden with coal or stone are treated as a distinct class. But they are not treated as a distinct class of coasters: they are only distinguished, in sect. 8, for the purpose of laying down the amount of duty. The charge in their case is according to the cargo (by the chaldron as to coals, which, at the time of this Act passing, were not measured by tons), and by the ton if it be stones; the charges on other vessels are by the ton, according to the tonnage of the vessel. It may be said that the subject of the duty, as to the third class, is the cargo and not the vessel; and that sect. 14 does not exempt cargoes. By sect. 12, the owner of outward bound vessels may claim from the merchant in all cases a payment, per ton of the cargo, of the same duty as is imposed on the ship per ton; so that, in the case of an incomplete cargo, a part of the duty falls on the shipowner, but, if the cargo be complete, all falls on the merchant. Now clearly the object of the statute was to impose the tax on the owner of the ship, allowing him to recover from the merchant in proportion to the goods carried. And this will happen, if he be liable only for the first voyage in the year: for then, whether he has been fully repaid or not for the duties of the first voyage, he will neither pay nor recover any duty in respect of later voyages in the year, and the benefit will practically accrue to the merchants in the coasting trade who employ the ship in the later voyages: and this is the intention of the Act. But, if it be held that this is a tax, not on the ship, but on the particular cargoes themselves, and that, though coasting vessels generally are exempt, yet certain cargoes are

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nevertheless liable to the duty, the owner of a coasting vessel carrying such cargoes will, by the words of the 8th section so understood, be absolutely exempted from duty, and yet will be entitled to claim from the merchant the duty in respect of the tonnage, for every voyage, by the 12th section. This of course cannot have been the intention of the Legislature. Therefore, the reasonable interpretation is that sect. 8 makes all the vessels (not the cargoes) liable to duty, but according to different modes of rating; that sect. 14 exempts from this duty all coasting vessels that have paid once during the year; and that sect. 12 enables the owners of all vessels which are liable upon any voyage to recover from the merchant, as to that voyage, in proportion to the goods carried. Sect. 15 gives the power of distraining on the vessels and their effects for the duty. Sect. 16 throws the legal responsibility on the shipowner and his servants, in the case of all the duties. And the exempting sections refer only to ships belonging to particular districts or places, not to the cargoes, as to which no distinction is made.

Secondly: In consistence with the above view, the duty is to be levied in proportion to the tonnage on the first cargo of the year.

Willes, contra. First: Sect. 14 was clearly intended for the benefit of the coasting merchant, who is partially relieved from the liability imposed on him by sect. 12. Sect. 8 imposes a duty on two classes of vessels and one class of cargoes. Sect. 12 enables the shipowner, who has paid the duty, to recover from the merchant a sum in proportion to the tonnage. Sect. 14 exempts from more than one payment in a year such vessels only as are liable to the duty as vessels. Where the cargo is of

coals, the shipowner would pay only upon that cargo under sect. 8, and would recover all under sect. 12. [Lord *Campbell* C. J. Why should there be a duty on coals and stones only?] The reason probably was that in various other parts of the country there are local dues upon certain classes of goods, which suggested the making them the direct subject of duty here. The proviso which follows, in sect. 14, after the exemption in question would be unnecessary if the payment on the first voyage exempted for a year. It is true that, by sect. 15, there is a power of distraining on the vessels for the duty; but the defendant does not dispute that the shipowner is liable for the duty in the first instance.

The second question does not arise if the first is determined in favour of the defendant.

Sir *F. Kelly*, in reply, was stopped by the Court.

LORD CAMPBELL C. J. This seems to me a very clear case. Sect. 14 provides, in language most plain and unequivocal, that no coasting vessel shall pay the duty charged by the Act oftener than once in every one year: and the vessel in the present case is clearly a coasting vessel. What then is there to shew that she does not fall within the exemption? When we look at sect. 8, we see that she is excepted from the first and second classes, and that she is within the third class, being a ship laden with coal, in respect of which a rate may be laid not exceeding three halfpence for every chaldron of coals. That is the duty which is to be paid: there is no enactment that it is to be paid toties quoties: and I can find nothing to shew that a coasting vessel carrying coal is to be excluded from the exemption in

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sect. 14. The provision in sect. 14, that no collier returning in ballast from the *French* or *Flemish* coast, producing a certificate of her having paid duty on her outward bound voyage on her cargo of coals, shall be liable to the payment of any such duty for her inward voyage, is not inconsistent with this view; for, even allowing the exemption for which the plaintiff is now contending, she would, but for the provision, have been liable to duty on her inward voyage: the provision therefore does not weaken the effect of the first part of the section. Mr. *Willes* represents the 8th section as a direct tax upon coal: but very strong words would be requisite to shew that such a specific tax was imposed. I am certainly of opinion that there are not here words strong enough. The answer to the first question must be, that the Acts here do not authorize the exaction of such duty more than once in the year. The answer to the second question must be, that the payment must be calculated on the tonnage of the first cargo. We must suppose that the Legislature in this case considered the cargo as a good test of the ship, as, on the assumption that the ship was fully laden, it would be.

COLERIDGE J. I am of the same opinion. On the first point I have nothing to add. As to the second, unless the duty be imposed on the tonnage of the cargo, I can find nothing in the Act authorizing the imposition of a duty at all.

ERLE J. I am of the same opinion. The exemption includes all coasters; and there is nothing to shew that a coaster which is a collier is taken out of the exemption.

CROMPTON J. I am of the same opinion. This vessel is clearly a coaster; and nothing appears in the Act to deprive her of the benefit of the exemption.

Judgment for plaintiff.

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The following case is inserted here on account of its connection with the succeeding one.

JAMES GRANGE *against* GEORGE TRICKETT.

[Friday,
November 14th,
1851.]

ASSUMPSIT against the maker of a promissory note for 61*l.* 17*s.* 7*d.*, dated 15th *October* 1849, payable on demand to the order of *Frederick Johnson*, and by him indorsed to plaintiff.

Plea 5: That, after the making of the note by defendant, and before the indorsement thereof to plaintiff, and before the commencement of this suit, "the said *Frederick Johnson*, then being a person in actual custody within the walls of one of Her Majesty's prisons in that part of the United Kingdom called *England*, to wit the *Lancaster Castle Gaol*, upon process for or by reason of a certain debt and costs at the suit of a certain person, to wit *James Butterworth*, did duly" apply by petition in a summary way to the Court for the relief of Insolvent Debtors, "for his discharge from such custody, according to the provisions of the said Act: in which petition was stated" &c. (setting out the requisite statements); and which said petition was duly subscribed and filed in the said Court. Averment: That, "upon the said filing of the said petition by the said *Frederick Johnson*, and

Assumpsit by indorsee against maker of a promissory note. Plea: That, before indorsement, the indorser, being in actual custody for debt, petitioned the Insolvent Debtors' Court; and by a vesting order all his property was vested in the assignee. Replication: That, after the appointment of the assignee, and before the indorsement by the petitioner, he was discharged from custody by his detaining creditor, without any adjudication by the Court. Demurrer. Held that, on

the petitioner being so discharged from actual custody, the property in the note revested in him under stat. 1 & 2 *Vict.* c. 110.; and consequently that the replication was good.

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before the commencement of this suit, and before the said indorsement of the said note to the plaintiff, to wit on" &c., "the said Court, in pursuance and according to the said statute, ordered that all the real and personal estate and effects of the said *Frederick Johnson*," &c., "except" &c., "and all his future estate, right, title, interest and trust in or to any real or personal estate and effects, within this realm or abroad, which he might purchase, or which might revert, descend or be devised or bequeathed or come to him before he should become entitled to his final discharge in pursuance of the said Act and according to the adjudication made in that behalf, or, in case the said *Frederick Johnson* should obtain his full discharge from custody without any adjudication being made by the said Court, then, before he the said *Frederick Johnson* should be fully discharged from custody, and all debts due or growing due to him, or to be due to him before such discharge as aforesaid, should be vested in one *Samuel Sturgis*, then and still being the provisional assignee" &c. "Which said order was then duly entered of record in the Court; and notice of the said order was duly published, according to the directions of the said Court: By virtue of which said order of the Court, so made as aforesaid, and by virtue of the said statute, the said promissory note in the declaration mentioned, and all right of action in respect thereof, became and were vested in the said *Samuel Sturgis*, as such provisional assignee as aforesaid." Averment that, after the making of the said vesting order, and before the said indorsement of the note to plaintiff, and before the commencement of this suit, one *James Grange* was duly appointed by the said Court assignee of the estate and effects of the said *Frederick*

Johnson for the purposes of the said Act; and the said *James Grange* accepted and signified to the said Court his acceptance of the said appointment; which said appointment was then, and after such acceptance thereof by the said *James Grange*, entered of record of the said Court: as by the said appointment, reference being thereunto had, will more fully appear: and notice thereof was duly published according to the directions of the said Court. And thereupon, by virtue of the said appointment, the said promissory note, and all rights and causes of action in respect thereof, became and were and now are vested in the said *James Grange* as such assignee as aforesaid. Verification.

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Replication. That, after the appointment as assignee of the said person in the said 5th plea mentioned, and the acceptance by him of such appointment, and before the indorsement by the said *Frederick Johnson* to the plaintiff in the said declaration mentioned, the said *Frederick Johnson* was discharged from custody by his detaining creditor in the said 5th plea mentioned, and with his consent, without any adjudication by the said Court for the relief of Insolvent Debtors having been made in that behalf. Verification.

Demurrer, assigning causes which it is unnecessary to specify. Joinder.

Crompton, for the plaintiff. The case depends upon the construction to be put on stat. 1 & 2 Vict. c. 110. Sect. 35 provides that persons in actual custody for debt may apply, by petition, to the Court for the relief of Insolvent Debtors, for their discharge, and prescribes the statements required to be in the petition. Sect. 36 gives power to a detaining creditor to apply by petition

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to the same Court for a vesting order. Sect. 37 enacts that, "upon the filing of such petition by such prisoner, or on the filing of such petition by such creditor or creditors as aforesaid, and the evidence in support thereof, as the case may be, it shall be lawful for the said Court for the relief of Insolvent Debtors, and such Court is hereby authorized and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel," &c. "of such person and his family, and the working tools" &c. "of such prisoner, not exceeding in the whole the value of 20*l*., and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this Act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said Court, then before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of Insolvent Debtors in *England*, and such order shall be entered of record in the same Court, and such notice thereof shall be published as the said Court shall direct; and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every

nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee : Provided always, that in case the petition of any such prisoner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes : Provided also, that in case any such vesting order as aforesaid shall become null and void by the dismissal of the prisoner's petition, all the acts theretofore done by the said provisional assignee, or any person or persons acting under his authority, according to the provisions of this Act, shall be good and valid ; and no action or suit shall be commenced against such provisional assignee, nor against any person duly acting under his authority, except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon : Provided also, that when such vesting order shall have been made on the petition of a creditor as aforesaid, it shall be lawful for the said Court, if it shall seem just and right, but not without proof made to the satisfaction of the said Court of the consent of the petitioning creditor, to make order declaring such vesting order to be null and void, and the same shall thereupon be null and void to all intents and purposes." The first part of this section in express terms vests all the insolvent's property in the provisional assignee. The plaintiff's point seems to be that the subsequent discharge of the insolvent from custody, by itself alone, divests such property : there are no words to that effect ; and the provisos shew that such was not the intention of the Legislature. The first proviso is, that, when the Court dismisses the petition of the prisoner, the vesting order

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shall be null and void; but upon that follows another proviso, that no action shall be commenced against such provisional assignee, except to recover property "detained after an order made by the said Court for the delivery thereof, and demand made thereupon." It seems therefore that, even where the vesting order is expressly made null and void in consequence of the act of the Court, the Legislature contemplated that a fresh order would have to be made before the property, then vested in the assignee, could revest in the prisoner. And the next proviso shews that, where the petition is that of the creditor, and he consents, still an order of the Court is necessary. It would be inconsistent with the whole scheme of this enactment if the detaining creditor could, by consenting to the discharge of the prisoner from custody, annul the vesting order of his own authority. Some express enactment is required to divest property once vested: and accordingly the Legislature, where that is intended, provides, by sect. 92, that when the Court are satisfied that the debts have been paid there shall be an order revesting any surplus of the property. But there is no enactment that if the prisoner escapes from custody there shall be a revesting. Sect. 44 is relied on by the plaintiff. It enacts that, "in case any prisoner as to whose estate and effects any such vesting order as aforesaid shall have been made shall by the consent or default of his detaining creditor or creditors be discharged out of custody without any adjudication being made in that behalf by the said Court for the relief of Insolvent Debtors, all the acts done before such discharge by the said provisional assignee, or other assignee or assignees appointed as hereinafter provided, or other person or persons acting

under his or their authority, according to the provisions of this Act, shall be good and valid; and that in such case, or in case such vesting order as aforesaid shall be avoided by any fiat in bankruptcy thereafter issuing against such prisoner, as hereinbefore provided, no action or suit shall be commenced against such provisional assignee, or against any assignee or assignees appointed under this Act, nor against any person duly acting under his or their authority, except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon." This, however, is a protecting clause making the acts of provisional assignees valid, not an enactment reassigning the property. This Court, in *Drury v. Hounsfield* (a), thought that the detaining creditor, if he received payment and discharged the insolvent, could not retain the money against the assignee. If the assignee could recover that money, a fortiori he must retain what was already vested in him. And it would obviously have been impolitic if the Legislature had left it in the power of the detaining creditor to affect the interest of the other creditors, on being bought off. There are some formal objections made to the plea; but they either do not arise, or are all of such a nature as to be cured by pleading over.

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C. Milward, contra. The plea sets up a vesting order made by the Insolvent Debtors' Court: but, since stat. 10 & 11 *Vict. c. 102. (s. 10.)*, the jurisdiction to make an order on a petition by a prisoner imprisoned in a gaol more than twenty miles from

(a) 11 *A. & E.* 101.

[1851]. *London* is in the county court. [*Wightman* J. How

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does that point arise here? There is nothing on this record to shew us that *Lancaster Castle* is not within twenty miles of *London*. I do not think we are bound to take judicial notice in your favour of that fact.] Then as to the main question, which is, whether the discharge from custody annuls the vesting order. There is a distinction between the petition by the prisoner under sect. 35, and the petition by the detaining creditor under sect. 36. The proceedings on the latter are compulsory against the prisoner; and he can be forced on in every step: but the proceedings on the petition of the prisoner are voluntary; and his power to take each step is dependent on his being in custody. By sect. 35 the petition can be only by a person "in actual custody;" and the prayer of the petition is "to be discharged from custody, and to have future liberty of his person." By sect. 37, the present property of the prisoner, and any property which shall come to him "before he shall become entitled to his final discharge in pursuance of this Act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said Court, then before such prisoner shall be so fully discharged from custody," shall vest in the assignee. So that on the prisoner's discharge future estate ceases to vest; and it seems reasonable that property already vested should be divested. Then follow provisions as to the case of petitions dismissed by the Court; but the Court has no jurisdiction to dismiss a petition by the prisoner himself, after he is discharged from custody without leave of the Court. Sect. 38 enacts "that no prisoner shall upon his own petition be entitled to the

benefit of this Act who shall not be at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any court or otherwise." Then follow several provisoes giving the Court power in exceptional cases to relax the severity of this enactment. The present case does not fall within them. What is to be done with the property of the prisoner in case, after he has petitioned, he is discharged by the detaining creditor? The petitioner cannot have the benefit of the Act; for he is no longer in actual custody. The creditors cannot get the property; for, as a preliminary step, the prisoner must file his schedule under sect. 69: but, not being in actual custody, he cannot do it. No power is given to the Court in such a case to order a reassignment. It could not be intended that the property should remain in the assignee for his own benefit. The true construction of the act must be that it reverts in the discharged prisoner. Sect. 44 would be superfluous on any other construction.

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Crompton, in reply. By the operation of sect. 38 the discharged prisoner is not entitled to the benefit of the Act: but it does not affect the rights of his creditors to have the property, already vested, distributed among them.

Lord CAMPBELL C. J. I am of opinion that this replication is good. There is no express enactment in stat. 1 & 2 *Vict. c. 110.*, that on the prisoner being discharged the property should revert in him; but the intention seems clear that such should be the result. For in sect. 44 it is provided that no action shall lie

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against the assignee, after the prisoner is so discharged, "except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon." That evidently contemplates that the property of a tangible nature and in the possession of the assignee is to be restored to the petitioner: and, by necessary implication, what is not of a tangible nature or not in the possession of the assignee must revert in the petitioner. I do not see what can otherwise be done with it. Mr. *Crompton* says it is to be distributed amongst his creditors; but there is no machinery in the Act for distributing it amongst them after the prisoner is discharged. I think, therefore, that the replication in this case shews that the property in the note had reverted in *Johnson*, so that he could indorse it to the plaintiff; and, consequently, that it is a good replication.

PATTESON J. I could not make out what was the operation of the Act until I read sect. 44. That does not seem to mean that the vesting order shall be void ab initio; for then the assignee would be liable to all actions: but it enacts that he shall not be liable to any action except one to recover any property of the prisoner "detained after an order made by the said Court for the delivery thereof, and demand made thereupon." From that it seems that the Court ought to make such an order; and, if the assignee is to be ordered to deliver up such property of the prisoner as is in his possession, such property of the prisoner as is not the assignee's possession must be intended to revert in the prisoner without any order; and that is this very case. I think it therefore a good replication.

COLERIDGE J. There is no express enactment that the property shall revest; but there is a strong inference that such was the intention of the Legislature. The property of the petitioner is given up by him with a view to obtain the benefit of the Act: if he does not obtain the benefit of the Act, surely he ought to have it back. Then let us look at sect. 44. It does not protect all persons from actions for things done under the vesting order before the discharge; but it protects the assignees and those acting under them from actions; and then it proceeds to say, not that the Court shall make an order before there shall be a delivery of the property of the prisoner to him, but merely that, possession being rightfully in the assignee, he shall not be liable to an action for detaining it until there shall be an order made and notified to him. That seems to me, by necessary implication, to say that the property has already revested in the person to whom the possession is to be delivered: that is, the discharged prisoner.

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WIGHTMAN J. I also think that the effect of sect. 44 is to shew that the vesting order ceases to exist except for the purpose of protecting the assignees. In the present case, the note seems never to have been in the possession of the assignee. After *Johnson* was discharged from custody the assignee could not obtain possession of the note; and the result seems to me to be that the property in the note revested in *Johnson*, and was, by his indorsement, vested in the plaintiff.

Judgment for plaintiff (a).

(a) See the next case.

[1852.]

[Friday,
June 18th,
1852.]CHARLES MIDDLETON KERNOT *against* FRANCIS
PITTIS.

Where an insolvent, after a vesting order has been made on his own petition, is discharged, without adjudication, by the default or consent of creditors, and sues a party detaining goods which came to the provisional assignee before the discharge, no order of the Insolvent Debtors' Court having been made for delivering them up:

Held, by Lord Campbell C. J. and Coleridge J., that, whether or not the property re-vested in the insolvent by such discharge, the action, cannot by sect. 44 of stat. 1 & 2 Vict. c. 110., be

brought against a person acting by authority of the provisional assignee, though the authority was not given till after the discharge.

Held, by Erle J., that the property does not so re-vest in the insolvent, and therefore that the action cannot be brought by him against any party.

On error in the Exchequer Chamber:

Held: that the property does not so re-vest, and therefore that the action cannot be brought by the insolvent against any party.

DETINUE, sur trover, for goods. Plea: That, before the accruing of the causes of action, plaintiff, then being a prisoner in actual custody in the Queen's Prison, detained at the suit of *John Peacock* under a writ of attachment, and also at the suit of *Thomas Magnus Cattlin* under a detainer, petitioned the Court for the relief of Insolvent Debtors: the plea, in the ordinary form, set out the effect of the petition, that it was subscribed and filed, and that the Court in the usual form made an order vesting all the plaintiff's property in the provisional assignee for the time being, and his successors: and that, by virtue thereof, the goods in the declaration mentioned, whilst the plaintiff was in actual custody, and before the accruing of the causes of action, vested in *Samuel Sturgis*, then being provisional assignee. Averment: that the vesting order still remains in full force, and that "defendant, as servant and by the authority and command of the said *S. Sturgis*, as and so being such provisional assignee as aforesaid, after the making of the said vesting order as aforesaid, detained the said goods;" which are the said supposed causes &c. Verification.

Replication: That, after the making of the vesting order, and before the detention of the goods, plaintiff was discharged out of the custody in the plea mentioned by the default of the said *John Peacock*, and by the consent of the said *T. M. Cattlin*, the said detaining creditors of the plaintiff, without any adjudication being made on the said petition of the plaintiff by the Court; and that defendant detained and detains the said goods after plaintiff had been so discharged, and did not detain nor does he detain the same or either of them "by virtue of any order, authority or command of the said *S. Sturgis*, made or given to the defendant before the plaintiff was so discharged as aforesaid." Verification.

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Demurrer (assigning causes on which the decision of the Court did not turn). Joinder.

The case was argued in *Trinity* Term, 1852 (*a*).

Willes, for the defendant. This case is in one respect distinguishable from *Grange v. Trickett* (*b*); for the plea here alleges that the defendant acted under the orders of the provisional assignee; and stat. 1 & 2 *Vict. c. 110. s. 44.*, on which the decision in *Grange v. Trickett* (*b*) turned, expressly enacts that no action shall be brought against the provisional assignee, or any one acting under his authority, except to recover any property "detained after an order made by the Court for the delivery thereof, and demand made thereupon." The replication meets this by saying that there was no authority given by the provisional assignee

(*a*) June 4th, before Lord Campbell C. J., Coleridge, Erle and Crompton Js.; and June 8th, before Lord Campbell C. J., Coleridge and Erle Js.

(*b*) Ante, p. 395.

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before the discharge of the plaintiff; but it is clear that the object of the enactment was to protect those acting under the provisional assignee from the necessity of ascertaining, at their peril, whether the prisoner was discharged or not. On this ground the defendant may have judgment without impeaching *Grange v. Trickett*(a): but one object of defending the present action is to have that decision reviewed. That case appears to have been argued entirely on stat. 1 & 2 Vict. c. 110.; but the provisions of the former Insolvent Acts throw light upon the construction of that Act. Stat. 53 G. 3. c. 102. s. 10. required a conveyance to be executed by the prisoner, on adjudication, by which his property was conveyed to an assignee for the benefit of those as to whom he was discharged. Sect. 13 enabled the court to avoid his discharge; in which case it is provided that the property shall be reconveyed to the prisoner. By the next Act, stat. 1 G. 4. c. 119., s. 4., there is to be an actual assignment; but, instead of being made at the time of adjudication, it is to be made at the time of petitioning; and the assignment is to be "subject to a proviso that in case such prisoner shall not obtain his discharge by virtue of this Act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes." Both under this proviso, and under stat. 53 G. 3. c. 102., the property remained in the assignee until the doing of an act by the Court, viz. dismissing the petition; in neither was the revesting at the option of the detaining creditor. Then came stat.

(a) Ante, p. 395.

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7 G. 4. c. 57. Sect. 11 of that Act required an assignment to be executed at the time of petitioning, subject to a proviso in the same words as those of stat. 1 G. 4. c. 119. s. 4., already noticed. Sect. 18 of stat. 7 G. 4. c. 57. enacts: "That in case of the dismissal of the petition of any such prisoner seeking relief under this Act, all the acts done before such dismissal by the said provisional assignee, or other assignee or assignees, appointed as hereinafter provided, or other person or persons acting under his or their authority, according to the provisions of this Act, shall be good and valid; and that in such case, or in case the conveyance and assignment made by such prisoner as aforesaid shall be avoided by any commission of bankrupt thereafter issuing against such prisoner, as hereinbefore provided, no action or suit shall be commenced against such provisional assignee, nor against any assignee or assignees appointed under this Act, nor against any person duly acting under his or their authority, except to recover any property, estate, money or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon." From these enactments, the clauses in question of stat. 1 & 2 Vict. c. 110. were compiled. Sect. 37 of this Act substitutes a vesting order for the assignment required to be executed by stat. 7 G. 4. c. 57. s. 11.; and sect. 44 reenacts stat. 7 G. 4. c. 57. s. 18., with some change of language, which has given rise to the difficulty. But, though the change in the language has inadvertently made sect. 44 in some respects a superfluous enactment, it has not the effect which was supposed in *Grange v. Trickett* (a). The vesting order, by sect. 37, conveys

(a) Ante, p. 395.

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C. Milward, contra. The previous Acts were all repealed by stat. 1 & 2 *Vict. c. 110.*; and the Court cannot be asked to conjecture that the Legislature have, by mistake or inadvertence, used part of the old Acts as a precedent for the new one. First, however, as to the averment of the authority of the provisional assignee given to the defendant. This is traversed by the replication; but it was unnecessary to do so; for it was a premature

(a) Delivered in the Court for the relief of Insolvent Debtors, *January 2d, 1852; In the matter of Henry Collins Mander.*

allegation, in the plea. The proper course of pleading would have been to reserve that allegation till after the replication had made it material; then it should have been rejoined. It being prematurely averred, the plaintiff is not bound, nor indeed entitled, to notice it. [Lord *Campbell* C. J. No doubt, if it is premature it need not be noticed. All pleaders agree that you need not leap till you come to the stile (*a*).] The main question is therefore raised which was decided in *Grange v. Trickett* (*b*). Now it is important to observe that sect. 35 of stat. 1 & 2 *Vict. c.* 110. directs that the prisoner, in his petition, shall state that he is willing that all his estate shall be vested in the provisional assignee, and shall pray to be discharged by the Court. Thus a species of contract is entered into between the prisoner and his creditors under the sanction of the Court. If the contract of either party is not carried into effect, all falls to the ground. Proceedings under sect. 38 are somewhat analogous to those under a bill in equity filed by a creditor for the distribution of the debtor's estate. The detaining creditor can enforce the distribution, as he is not bound to assent to the discharge of the prisoner upon his own claim being satisfied; *Hollis v. Bryant* (*c*), cited in note (*a*) to 2 *Chitty's Statutes*, 584 (2d ed.). Sect. 37 applies to both sorts of petition, and stops the process of vesting from the time when the prisoner receives his full discharge without adjudication; and this shews the general principle, that a discharge reverts the prisoner's property. [Lord *Campbell* C. J. The strong argument against you is that sect. 37 makes the vesting order

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(a) See Sir *Ralph Bovy's case*, 1 *Vent.* 217.(b) *Ante*, p. 395.(c) 4 *M. & G.* 578.

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null and void either upon the Court, dismissing the petition, or upon the Court annulling the order, if it thinks right, on proof that the petitioning creditor is satisfied, thus making a proceeding of the Court a step in each case: and that therefore sect. 44 must be disregarded, as inconsistent with sect. 37. You say that, besides this, the vesting order becomes of itself null when the prisoner is discharged without any adjudication.] That is the answer. The final discharge of the prisoner's property from liability can take effect only by all the debts being satisfied, or by a compromise; so that the construction which the plaintiff puts on the statute will not have the effect of defeating creditors. The vesting order is, by sect. 37, without any express order to that effect, annulled by the Court dismissing the prisoner's petition: the order of the Court to annul the vesting order is wanted only in the case of a creditor's petition: the case where the prisoner is fully discharged without adjudication is analogous to the former of these two cases. Under sect. 38, the fact of the prisoner being in actual or virtual custody is essential as a foundation of jurisdiction. In *Drury v. Hounsfield* (a) this Court assumed that the discharge of the prisoner by the creditor would enable him to evade the authority of the Insolvent Debtors' Court. The machinery of that Court appears to be properly applicable only where the creditor and the prisoner are contending together. In the case of a prisoner's petition being treated as an act of bankruptcy, the fiat divests the existing real and personal estate of the prisoner out of the provisional assignee: but the vesting order is still to

(a) 11 A. & E. 101.

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remain of record, and takes effect, after the certificate, as to all future property; sects. 39, 40. Sect. 41 applies only to such cases of default, on the part of a plaintiff, as occasion a supersedeas, a judgment of non-pros, or judgment as in case of a nonsuit, proceedings in which the prisoner himself must take an active part against the plaintiff: but it does not follow that a creditor may not, by renouncing his right, effectually release the prisoner. *Buzzard v. Bousfield* (a) was an instance of the application of a similar clause in an earlier Act. No object can be suggested for the clause protecting the assignee, in sect. 44, unless the property was revested in the prisoner under the circumstances there mentioned. That it should revest is consistent with sect. 37 and the other provisions requiring all proceedings to take place during the custody of the prisoner. Sect. 44 will also protect the provisional assignee in the case of bankruptcy of the prisoner. Suppose the detaining creditor to discharge the prisoner without his consent, then, on the construction suggested on the other side, the prisoner will have no benefit from the statute, but the creditor will get the dividend on the property already realised. Sect. 62 speaks of a dividend being made "before" and "after" adjudication: there is no mention of a dividend made "without" adjudication: it may be assumed therefore that a dividend could not, in the view of the Legislature, be made except in the case where parties were proceeding to adjudication. [*Erle J.* Suppose the whole property realised, and then a fraud by a creditor discharging the prisoner: is there to be no dividend?]

(a) 4 M. & W. 368.

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The prisoner then gets back all the property: he is simply replaced in the position in which he stood before the proceedings commenced. No one is barred of his legal remedy. [Lord *Campbell* C. J. Creditors may have been prejudiced by the delay.] On the other hand, they may be benefitted by the property having, during the interval, been preserved without preference. The machinery in sect. 69 is inapplicable to a case where the prisoner has been discharged: and the same remark applies to sect. 71 and the following sections: all suppose the insolvent to be in custody.

Willes, in reply. The necessity for the prisoner being in custody, in order that the machinery of the court may work, seems to be inferred from the supposed necessity for a schedule. That, however, is not indispensable. Even a prisoner in custody might refuse to give a schedule. Express provision is made, in sect. 102, for the case of an insane person, who of course could give no schedule. Or a debtor might die before he had given one in: surely in that case his goods would be distributed: yet, if the argument on the other side be valid, they ought to revert in the personal representative. The Court does not lose jurisdiction in the case of a prisoner escaping, although, under sect. 38, the prisoner would lose the benefit of the Act. It is said that the arrangement is in the nature of a contract, the consideration of which is the prisoner's discharge: but, under sect. 40, though the prisoner would not be discharged by virtue of the Act, but under the bankrupt laws, the vesting order still continues. [*Coleridge* J. He does, however, obtain a discharge in that case. Lord *Campbell*

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C. J. The general principle is analogous to that of a cessio bonorum: according to your view, a malicious creditor might discharge a prisoner, against his will, as soon as the property had been got in, and leave him under his liabilities.] Probably, in that case, the Court would think it fit to dismiss the petition. [Lord Campbell C. J. That would often be an insufficient remedy: the property might have been sold; or a dividend might have been made before adjudication.] That hardship might arise on the one construction as well as the other. The provisional assignee cannot be sued in any court: and, if the prisoner sued a creditor for the dividend, the creditor might plead a set-off. The other side are bound to shew an affirmative enactment which avoids the vesting order: it is not even enough to shew that the framers of the Act thought that it would become void. All that can be inferred from *Drury v. Hounsfield* (a) and *Hollis v. Bryant* (b) is that money paid by the insolvent to a creditor is received to the use of the assignee. As to the special form of the plea: it brings the defendant within the protection of sect. 44, shewing that he acted under the provisional assignee; it was necessary that authority should appear. The replication impliedly admits an authority given after the discharge: that raises the question whether, after the discharge, the provisional assignee could give the authority. The allegation of the authority is not premature: a stranger could not have justified; *Herbert v. Sayer* (c).

Cur. adv. vult.

The learned Judges, not agreeing as to the grounds of their judgments, now delivered them seriatim.

(a) 11 A. & E. 101.

(b) 4 M. & G. 578.

(c) 5 Q. B. 965.

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Lord CAMPBELL C. J. I do not think that I am called upon in this case to review our decision in *Grange v. Trickett* (a), as the defendant is entitled to our judgment whether the property in the goods mentioned in the declaration did or did not revest in the plaintiff on his discharge from custody. If the property still remains in the provisional assignee, of course the action is not maintainable. But, if it revested in the plaintiff, still I think there is a good defence under sect. 44 of stat. 1 & 2 Vict. c. 110., which enacts: "that in case any prisoner as to whose estate and effects any such vesting order as aforesaid shall have been made shall by the consent or default of his detaining creditor or creditors be discharged out of custody without any adjudication being made in that behalf by the said Court for the relief of Insolvent Debtors," "in such case" "no action or suit shall be commenced against such provisional assignee, or against any assignee or assignees appointed under this Act, nor against any person duly acting under his or their authority, except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon."

The defendant, in his plea, after setting out the proceedings in the Insolvent Debtors' Court down to the making, recording and publishing of the vesting order, whereby the goods in the declaration mentioned became vested in *Samuel Sturgis*, the provisional assignee, further says that he, the defendant, "as servant and by the authority and command of the said *Samuel Sturgis*, as and so being such provisional assignee as aforesaid,

after the making of the said vesting order as aforesaid, detained the said goods" in the said declaration mentioned, as therein alleged, as he lawfully might for the cause aforesaid.

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The replication does not allege that any order had been made by the Insolvent Debtors' Court for the delivery of the goods to the plaintiff, or that they had been demanded from the provisional assignee or from the defendant; but, after stating the plaintiff's discharge out of custody without any adjudication, with the consent of *Catlin*, the detaining creditor, concludes with merely averring that defendant did not detain, nor does he detain, the said goods "by virtue of any order, authority or command of the said *Samuel Sturgis*, made or given to the defendant before the plaintiff was so discharged as aforesaid."

The plaintiff thus admits that the goods were detained by the defendant under the authority and command of *Sturgis*, the provisional assignee, given after the plaintiff's discharge from custody, but before any order by the Court for the delivery of the goods, or demand made thereupon. Must not the defendant be taken to have detained the goods under the authority of *Sturgis* within the meaning of the enactment referred to? It seems quite clear that *Sturgis* himself would not have been liable to an action if he had detained the goods in his own hands after the plaintiff's discharge from custody, till order for delivery and demand: can it be contended then that a warehouseman, agent or servant employed by him to keep them safely is liable to this action? I think that the same protection is extended to him as to the provisional assignee. We are now arguing upon

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the supposition that the discharge of the debtor before adjudication reverts in him the property in his effects which had vested in his provisional assignee. To protect the provisional assignee and those acting under his authority from an action for detaining goods till they know authentically that the debtor is entitled to them and they have an opportunity of delivering them up to him, it seems to me that this very reasonable provision is introduced, which is quite consistent with the title being in the debtor and with his having a right to call upon the Court to make an order for restoring the goods, as suggested by my brother *Patteson* in *Grange v. Trickett* (a).

Objection was made to the allegation, in the plea, of a detainer by authority of the provisional assignee, on the ground that it was premature, and therefore that there was no occasion to traverse it: but I am of opinion that this allegation might be introduced into the plea; and that, on the demurrer to the replication as it is framed, there ought to be judgment for the defendant.

COLERIDGE J. I agree that the defendant is entitled to judgment, on the ground stated by my Lord: and I also agree in thinking it not necessary to review our judgment in *Grange v. Trickett* (b).

ERLE J. I am of opinion that the vesting order mentioned in the plea continues in force, notwithstanding the discharge from custody with the consent of the plaintiff mentioned in the replication.

(a) Ante, p. 404.

(b) Ante, p. 395.

The vesting order, under sect. 37, transfers the property to the assignee; and there is no provision for defeating that title, or making the vesting order void, or its power to cease, by such a discharge from custody. The pernicious effect of enabling the insolvent to collude with the detaining creditor for the purpose of defeating the rights of the other creditors is obvious; and that effect would be prevented by holding the vesting order valid until an adjudication under sect. 37 has rendered it void. With respect to sect. 44, although the provisions for the protection of the assignee may be superfluous unless the vesting order is rendered void, still I think it a sounder construction to hold them to be superfluous rather than create by conjecture a defeasance to an important title for the purpose of finding an application for them. It is unnecessary for me to say more, as the reasons for this construction are fully and clearly given in the judgment of Mr. Commissioner *Law* in the matter of *Henry Collins Mander* (a).

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The 44th section has been construed by my Lord and my brother *Coleridge* to protect the assignee from any action until after an order for delivery of property by that Court, although the vesting order is rendered void by a discharge from custody, and so to defeat the present plaintiff. But, if the vesting order was intended to be made void, it is anomalous to suppose it should have force after avoidance to protect the person who was assignee under it, for taking or keeping of the property of the person that was insolvent, subsequent to such avoidance, and to debar the alleged insolvent from the common remedies for protection of property until he

(a) Ante, p. 410, note (a).

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should obtain an order of that Court authorizing him to use such remedies. By this construction, the Legislature would have made the vesting order void, and, at the same time, for many purposes valid, until an order of the Court for Insolvent Debtors should have been made, which seems an inconsistency; and anomalies in respect of title to property are introduced. And, as all the advantages of this construction would be obtained without inconsistency or anomaly by holding the vesting order valid until made null by the Court, I dissent from the construction holding it void, and the assignee after its avoidance to be protected thereby.

Judgment for defendant.

Afterwards a second plea was added by consent, for the purpose of reviewing the decision in *Grange v. Trickett* (a) in a Court of error. This plea followed the first down to and including the allegation of the vesting in *Samuel Sturgis*; and then contained only an allegation "that the said vesting order has not been in any manner set aside." To this the plaintiff replied the discharge, as in the replication to the first plea, without any allegation as to the detainer by order of *Sturgis*. The defendant demurred: and the plaintiff joined in demurrer. Judgment was, on this demurrer, entered for the plaintiff without argument (b).

(a) Ante, p. 395.

(b) See the next case.

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IN THE EXCHEQUER CHAMBER.

CHARLES MIDDLETON KERNOT *against* FRANCIS
PITTIS, in Error. *Saturday,*
May 28th.

THE plaintiff in the preceding case alleged error; which the defendant denied. For marginal note, see the preceding case.

Ball (in the absence of *Milward*) for the plaintiff in error (plaintiff below). It will be convenient, in the first place, to discuss the second plea, which raises simply the question decided in *Grange v. Trickett* (a); inasmuch as the defendant is entitled to have the judgment of the Court of Error on that plea, though he does not allege error (b), and, if the plaintiff cannot maintain his judgment on the replication to the second plea, he is of course not entitled to reverse the judgment on the replication to the first plea, that plea containing all that the second plea contains. Therefore the question is, whether, when the insolvent is discharged without adjudication, by consent, the property is thereby revested in him. (He then argued on the effect of the 37th and 44th sections of stat. 1 & 2 *Vict.* c. 110., and relied upon *Grange v. Trickett* (a). The argument, being substantially the same as that urged in the two preceding cases, is not here repeated.)

Willes, *contra*, contended that the jurisdiction attached to the Insolvent Debtors' Court, for the benefit of all

(a) *Ante*, p. 395.(b) Stat. 16 & 17 *Vict.* c. 76 s. 157.

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the creditors upon the petition, and that the order of the Court was not annulled by a discharge without adjudication. That under stat. 53 *G. 3. c. 102. s. 10.* the insolvent was directed to assign when the Court was satisfied that he was entitled to the benefit of the Act, and not before: that this was altered, in favour of creditors, by stat. 1 *G. 4. c. 119.*, which required the insolvent to assign to the provisional assignee at the time of his petitioning, sect. 7 vesting the estate in the creditor's assignee when the Court should adjudge the prisoner to be discharged: that this was continued by stat. 7 *G. 4. c. 57. s. 11.*; and that by both these statutes the assignment was got rid of only if the Court dismissed the petition: and that stat. 1 & 2 *Vict. c. 110.* did not, at any rate, shew any intention to weaken the interest of the creditors, the principal change being that by it the creditors could put the Insolvent Debtors' Court in motion, whereas this could previously be done only at the instance of the insolvent. (He then repeated the arguments before urged on sects. 37 & 44 of stat. 1 & 2 *Vict. c. 110.*, pointing out that sect. 62 shewed that the Insolvent Debtors' Court had the means of proceeding (a) without the insolvent being in custody, and that creditors might come in whose names were not in the schedule.) [The Court intimated that they agreed with the Court below in their judgment on the demurrer to the replication to the first plea: and the question on that plea was not further noticed.]

C. Milward, in reply, contended that no argument could be drawn from the various provisions of preceding Acts,

(a) In illustration of this argument, he referred to the judgment in *Russell v. The Men of Devon*, 2 *T. R.* 667.

stat. 1 & 2 *Vict.* c. 110. introducing in effect a completely new system. (He then repeated the arguments urged in the two preceding cases: and, as to the argument suggested from sect. 62, he contended that it was directed to cases where assignees were to act early in contemplation of there being ultimately an adjudication.)

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JERVIS C. J. I am of opinion that the view which my brother *Erle* took in the Court below is correct, and that the judgment, as to the demurrer to the replication to the second plea, must be reversed. We need not further consider the judgment on the other plea; for, if you reject the additional averment which it contains, the case becomes that of the second plea; and then the first must follow the event of the second. Now, as to the second plea, I will not enter at large into a discussion of Mr. Commissioner *Law's* judgment (*a*), a judgment which is quite satisfactory to me. This case may, I think, be decided upon a very clear point. If we reject sect. 44, there can be no question that the present state of things is provided for, and conclusively, by sect. 37. That, in effect, enacts that, on the filing of the petition, the Court shall make the vesting order, which shall affect all the insolvent's property which comes to him, and all debts due, up to the adjudication, when there is adjudication, and all which comes to him before his discharge, when he is discharged without adjudication. That is therefore, so far, a positive enactment vesting in the provisional assignee all that the insolvent is entitled to up to his discharge. Then comes one provision, and one only, divesting the property,

(*a*) See ante, p. 410, note (*a*).

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namely, when the prisoner's petition is dismissed: the vesting order then becomes null. That would lead us to conclude that on no other occurrence is the vesting order to become null: if it does not become null, the property remains in the provisional assignee. But then it is said that the provisions of sect. 44 are inconsistent with this view, because they provide against an action being brought against the assignee where the prisoner is discharged without adjudication, and no action could be brought if the property remained in the provisional assignee. But it is a mistake to read sect. 44 alone in this way. If you say that it shews by implication that the vesting order becomes null, sect. 37 shews still more strongly that it remains binding. It is not for me to say why the provision in sect. 44 was inserted: it was perhaps from extreme caution. But I do not think the inference, even from sect. 44 alone, a safe one. It seems to have been said that, because in a particular case an action is forbidden, it is allowed in other cases. It seems to me as necessary to use positive words in order to give a right of action as it is in order to exclude it. But, in truth, it is quite inconsistent with the legal rules of construction to say that, because an action is not to lie in one case, it is to lie in all other cases: in fact, to infer a positive right from negative words. And this result would be inconsistent with all the purposes of the Act. Sect. 37 is, in my opinion, conclusive. I think therefore that, so far as the second plea is concerned, the judgment of the Court below is wrong, and must be reversed. My brother *Parke* (a) desired me to say that he takes this view also.

(a) *Cresswell J.* and *Parke B.* had gone to Chambers, towards the close of the argument.

POLLOCK C. B. The only question is, whether the vesting order remains in force. Sect. 37 expressly directs an order vesting the property in the provisional assignee; and the vesting order is to become null and void in one case only, that of the dismissal of the petition. Then sect. 44 refers to the case, mentioned in sect. 37, of the prisoner being discharged without adjudication, and also to the case of bankruptcy, mentioned in sect. 39. In sect. 39 there is an express provision that the vesting order, in that case of bankruptcy, shall become null: but there is no such provision as to the other case. Mr. *Milward*, as I understand him, contends that, inasmuch as it is enacted that no action shall be brought against the provisional assignee, or any person acting under his authority, it may be brought against all other persons. That, I think, is too violent a presumption. Sect. 37 expressly vests the property, and divests it in one case only; sect. 39 divests it in another. We cannot infer a divesting where we do not find it enacted. If I were called upon to speculate on the cause for inserting sect. 44, I should say that something had been added which the framer of sect. 44 did not intend to insert, or something omitted which he did intend to insert. Our experience in modern legislation furnishes us with an instance like this, which is matter of history. There was an enactment and a proviso upon it. On the question, whether the enactment should stand, it was struck out: but the proviso was not struck out (*a*). A very learned Judge thought, not that the proviso should be treated as if struck out, but that the statute should be read as if the enactment remained. But that did not

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(*a*) See *Barbut v. Allen*, 7 *Exch.* 609, and the judgment of Pollock C. B. at p. 616, and in 21 *L. J. N. S. Exch.* 159.

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prevail. I think there were as good grounds for that view as for the view which the plaintiff in error here seeks to maintain. I entirely concur with the Lord Chief Justice of the Common Pleas, and think that the judgment as to the second plea must be reversed.

ALDERSON B. I am of the same opinion : and I have nothing to add.

MAULE J. I agree : and my brother *Cresswell* directed me to say that he does so too (a).

PLATT B. I agree, for the reasons which have been assigned.

TALFOURD J. concurred.

MARTIN B. I agree : sect. 37 is express.

Judgment on the demurrer to the replication to the first plea affirmed ; as to the replication to the second plea, reversed.

(a) *Cresswell J.* and *Parke B.* had gone to Chambers, towards the close of the argument.

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IN THE EXCHEQUER CHAMBER.

WILLIAM ORTON BRADLEY and TAYLOR POTTS
against The Master, Pilots and Seamen of
 the Town of NEWCASTLE UPON TYNE in the
 County of NEWCASTLE UPON TYNE.

Saturday,
May 28th.

ERROR upon a bill of exceptions. Joinder.

The defendants in error brought debt against the plaintiffs in error.

The first count charged that, before the commencement &c., to wit 22d March, 1851, defendants (below) were indebted to plaintiffs (below) in 50*l.* "for certain petty customs, tolls, dues, and duties then due and of right payable" by defendants (below) to plaintiffs (below), "in respect of divers goods, wares, commodities and merchandizes, to wit 1000 loads of teak wood," &c., of great value, to wit 50,000*l.*, "whereof the defendants were the owners; which, before then, and whilst the defendants were such owners thereof, to wit on the day and year last aforesaid, had been brought in divers ships and vessels from beyond the seas into the port of *Sunderland* in the county of *Durham*, the same being a creek and member of the port of *Newcastle upon Tyne*,

A charter, of 3 Ja. 2, granted to the Corporation of the Master, Pilots and Seamen of *Newcastle upon Tyne* primage (described in the charter as an ancient duty) upon goods brought by ship into the *Tyne*, or any of the creeks of *Newcastle*, of which *Sunderland* was one, to be rated and accounted "in manner and form following: that is to say," aliens and strangers born, and all other persons arriving with ships in *Newcastle* within any of the

creeks and not belonging to the same, to pay before they departed with their ships; and every free merchant and inhabitant of *Newcastle*, arriving in the *Tyne* with a ship, within ten days after landing the goods. The charter also granted to the Corporation all other perquisites, ancient duties and profits which they had theretofore lawfully had and enjoyed; and also provided that the sums granted by the charter should be in lieu of all other duties theretofore received.

Held: 1. That the charter was not inconsistent with the claim of primage in respect of goods imported into *Sunderland* by merchants resident there.

2. That evidence of usage was admissible in support of the claim.

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and then landed there, more than ten days before the commencement of this suit, to wit on the day and year last aforesaid."

The 2d count charged that defendants were indebted to the plaintiffs for certain other petty customs, &c., following the first count, but stating the goods to have been "brought in divers ships and vessels from beyond the seas into a creek and member of the port of *Newcastle upon Tyne*, to wit *Sunderland*, in the county of *Durham*, and then landed there more than ten days" &c.

The 3rd count was similar, except that the goods were stated to have been "brought by the defendants in divers ships and vessels from beyond the seas into a creek belonging to the port of *Newcastle upon Tyne*, to wit into *Sunderland*, in the county of *Durham*, and landed in the said creek more than ten days" &c.

Plea: Never indebted. Issue thereon.

The issue was found for the plaintiffs below, and judgment was entered for them.

The bill of exceptions stated that at the *Carlisle Assizes*, in *August 1852*, the issue came on to be tried (a).

Ancient charters, if ambiguous, are to be explained by the usage under them; and the jury, in that case, may interpret the charter by the usage.

As in the instance of a charter of 3 Ja. 2., upon the issue of which a question was raised

in 1851: when it was disputed whether the charter permitted primage to be taken of all ships entering *Sunderland* (a creek of *Newcastle upon Tyne*), or exempted ships belonging to merchants of *Sunderland*.

(a) Before *Wightman J.*

This case, *The Master, Pilots and Seamen of the Town of Newcastle upon Tyne in the County of Newcastle upon Tyne* against *Bradley and Potts*, was tried before, at the *Cumberland Summer Assizes*, 1851, before *Williams J.*, when a verdict was found for the plaintiffs, leave being reserved to move to enter a verdict for the defendants.

In *Michaelmas Term*, 1851, *Unthank* obtained a rule *Nisi* for entering a verdict for defendants, or for a new trial. In *Hilary Vacation* (*February 9th*), 1852, before *Patterson, Coleridge, Williams* and *Erle J.*, cause was shewn by *Watson* and *Manisty*; and *Unthank* and *W. D. Seymour* supported the rule.

Cur. adv. vult.

"And thereupon the plaintiffs alleged and insisted that they were entitled to an ancient due or duty called

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COLERIDGE J., in the same vacation, (*February 24th*), delivered the judgment of the Court.

This was an action of debt for petty customs, tolls, dues and duties, in respect of merchandize whereof the defendants were the owners, and which had been brought by vessels into the port of *Sunderland*, the same being, as alleged in the first count, "a creek and member of the port of *Newcastle upon Tyne*," and there landed. In the third count, the claim was in respect of merchandize brought by the defendants in ships into "a creek belonging to the port of *Newcastle upon Tyne*, to wit into *Sunderland*."

At the trial, before my brother *Williams*, the plaintiff had a verdict, subject to leave to enter it for the defendants on the point presently to be mentioned; and the defendants, besides moving for that, moved also, and obtained a rule *Nisi*, for a new trial on the ground of misdirection.

The duty in question was *primage*, said to be a prescriptive payment, at present claimed by the plaintiffs under a charter of 3 *Ja.* 2, which, after incorporating them under the name of Master, Pilots and Seamen of the town of *Newcastle upon Tyne*, in the county of *Newcastle upon Tyne*, and making several provisions, went on thus: "And, whereas, by the frequent and dangerous incursions of the sea upon the port of *Newcastle*, the Society are put to necessary and extraordinary charges for the prevention and repair of the ruins thereby daily growing, We are willing, for their better assistance therein, that, for the future, they may receive some reasonable payments and allowances in that behalf. Our will and pleasure therefore is, and we do hereby, for Us," &c., "*declare and grant unto the said*" &c., "that it shall and may be lawful to and for the said Master," &c., "to demand, receive, perceive and take of the owner, part owner, master, purser, or factor of every ship or vessel" a certain payment for pilotage, the pilotage extending both to the conducting such vessels up and down the *Tyne*, and in and out of any of the creeks or members of the same; and the rate being 12*d.* per foot of draught if loaded, and 6*d.* more from "all strangers and aliens;" 8*d.* if light, with an additional 4*d.* "of aliens or strangers." Then the charter went on to give, grant and confirm unto the said Master &c.: "that all person and persons, as well subjects as strangers born, being owner or owners of any goods, wares," &c., which shall be brought in any ship from beyond the seas "into the said river of *Tyne*, or the creeks or members aforesaid, or any creek or member belonging to the said port of *Newcastle upon Tyne*, shall, from time to time, as often as such goods," &c. "shall be so brought in, pay" "an ancient duty heretofore lawfully, accustomed and usually paid to the said Com-

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primage, which they alleged was payable to them by all persons being owners of any goods, wares or merchan-

pany," &c., "called primage, that is to say: 2d. of every tun of wine, oil and all other goods, wares, merchandizes and commodities rated and accounted by the tun (fish killed and brought in by the *Englishmen* only excepted), and 3d. for every last of flax," &c., "or any other goods," &c., "rated and accounted by the last, in manner and form following: that is to say: aliens and strangers born, and all other such person or persons which, with their said ships or vessels, shall arrive within the said port or in any of the said creeks or members, and not belonging to the same, before they depart with their ships or vessels from the said port or forth of the said creeks, shall pay the duties aforesaid for and in the name of primage, as is aforesaid: and every free merchant and other inhabitant of *Newcastle* aforesaid, arriving with their said ships or vessels within the said river of *Tyne*, shall pay the duties aforesaid within ten days after the landing of the said goods as aforesaid, upon lawful demand."

The defendants admitted the payment of primage at *Newcastle* for ships coming into the *Tyne*: but, it being admitted on the other hand that they were merchants and natives of *Sunderland*, and the claim being in respect of goods brought into *Sunderland*, of which they were either the owners or importers, they denied their liability, both upon the construction of the charter and its validity in so far as it extended to *Sunderland*.

Much evidence was produced on both sides: and, among other things, on the part of the plaintiffs was the very strong fact of a payment of the duty, under the same circumstances as those under which the defendants were now charged, for more than sixty years. At the close of the case, it appears that the course which the learned Judge took was this: treating the case, except as it might be affected by the construction to be put on the charter, nearly as an undefended cause, in consequence of the evidence of payment for so long a time, he reserved that point of construction for us, and, without comment or explanation, and without himself directing the jury at all as to the construction of the charter, or the effect of much documentary evidence put in by the defendants, simply asked them if they had any doubt that this was an immemorial payment. Upon which the jury found it to be an ancient due from time immemorial, belonging by prescription to the plaintiffs as a corporation.

Now it seems difficult to uphold this way of dealing with the case, unless we are prepared to maintain that the usage of payment here proved was, per se, and in spite of any evidence to the contrary, conclusive to establish the immemoriality and prescriptive nature of the due claimed. If the construction and validity of the charter, if the construction and weight

dizes brought in any ship or vessel from beyond the seas into the port of *Newcastle upon Tyne*, or into any of

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properly due to the documents produced on the part of the defendants, could be at all material helps to the jury in drawing their conclusion, it seems clear that they have not received the assistance which the learned Judge ought to have afforded them; and that their attention would be diverted from all the other evidence in the cause, and exclusively turned to the single and intelligible fact of payment.

This fact was undoubtedly very cogent: and it might in the end have prevailed over every doubt suggested by the other parts of the case. Still the defendants were entitled to have those other parts brought under the consideration of the jury, with all proper advantages, before they came to their conclusion. The rule has never been laid down on this matter more strongly than in *Jenkins v. Harvey* (1 C. M. & R. 877. See S. C. upon a second trial, 2 C. M. & R. 393.). It has been questioned whether it was not there laid down too strongly; see *Brune v. Thompson* (4 Q. B. 513. 552.). But, adopting the language used there (1 C. M. & R. 894), it went no farther than this: that "from uninterrupted modern usage" a jury "should find the immemorial existence of the payment, *unless some evidence is given to the contrary.*" Here the defendants contended that, even under the terms of the charter, there was no liability to the payment; and, further, that *Sunderland* was from time immemorial a separate port, of which the bishop of *Durham* was the grantee and lord: and that, although for fiscal purposes it had been made a member of the port of *Newcastle*, it was, for the purpose in question, distinct from it; and that the grant of the Crown therefore at any period *could not*, as the charter in question *did not*, extend to it.

Had the grounds and evidence on which this case rested been laid before the jury, they might still have found the payment immemorial, or they might not; and therefore we think there must be a new trial.

The learned Judge has reserved for our consideration the construction of the charter. It appears to be exactly one, the construction of which may be materially helped by the evidence of usage. But a few remarks on the language of it may be of service upon a new trial. First: it is to be observed that the grant in question follows on one of pilotage, which probably extends, not merely to the river and creeks within it, but to all creeks of the port: and a distinction seems to be made between the two: it is binding on all persons, distinguishing, by the amount to be paid, between subjects and "aliens or strangers;" and, as to the former, making no distinction between one class of subjects and another. The grant in question extends, in the first place, to all owners of goods imported, as

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the creeks or members thereof: and they alleged and insisted that *Sunderland* was a creek or member of the port of *Newcastle upon Tyne*: and they sought to recover from the defendants the sum of 24*l.* 5*s.* as and for primage, alleged by the plaintiffs to be payable to them by the defendants in respect of goods brought by the defendants in ships from beyond the seas into *Sunderland* aforesaid. And, in support of their said claim, and to maintain the issues above joined, the plaintiffs then and there produced and gave in evidence to the jury," "amongst other things, an inspeximus charter,

well subjects as strangers born (unless as to fish killed, and brought in by *Englishmen*), and in terms embraces all creeks or members of the port of *Newcastle*: the same amount is to be paid by all: and the only difference is as to the time of payment. Upon the clause providing for this difference, the main question arises: it is introduced by the words "in manner and form following," and certainly seems intended to provide, under one head or the other, for every person who was to pay at all. The first division is "aliens and strangers born, and all other such person or persons which" (that is to say "as"), "with their said ships or vessels, shall arrive within the said port, or in any of the said creeks or members, and not belonging to the same;" the second and only other division is "every free merchant and other inhabitant of *Newcastle* aforesaid, arriving with their said ships or vessels within the said river of *Tyne*." It is clear that a *Sunderland* man importing into *Sunderland* is not within the latter division; nor is he within the former, if the words "not belonging to the same" refer to the creeks or members, as well as to the port; and, according to ordinary rules of construction, they certainly do. If this were a charter of yesterday, and there were no usage to throw light on it, all that could be said for the plaintiffs would be that it was most unreasonable wholly to exempt importers, inhabitants of *Sunderland*, when those of *Newcastle* were charged; and it might be said, on the other hand, to be equally unreasonable not to give them, if liable, the same time for payment as the *Newcastle* men. But the strongest answer would be, quod voluit non dixit: there are no words to embrace the *Sunderland* importer into *Sunderland*, if it was intended to include him.

We are not, however, dealing with a charter of yesterday: and there is ambiguity enough to let in the evidence relied on on both sides.

Rule absolute for new trial.

granted to the plaintiffs by King *Edward* the Sixth." The bill then set out the charter, which was of 20th *October* 3 *Ed.* 6., and which recited by inspeximus, and confirmed, a charter of 5th *October* 28 *H.* 8., incorporating *The Master and Wardens of The Fraternity or Guild of the Holy and Indivisible Trinity, in the town of Newcastle upon Tyne*, by that name. The bill further stated that the plaintiffs gave in evidence an inspeximus charter of 1 *Mary*, confirming the charter of *Ed.* 6., and also a Royal Commission and Return thereto, whereby the Commissioners found that there were five creeks belonging to the port of *Newcastle upon Tyne*, namely *Blyth, Sunderland, Hartlepool, Stockton* and *Whitby*. That the plaintiffs also gave in evidence three charters respectively granted to plaintiffs by *James* 1. (3 *Ja.* 1.), by *C.* 2. (16 *C.* 2.) and by *Ja.* 2. (3 *Ja.* 2.): "which said three last mentioned charters, so far as the same related to the said due called primage, were and are all alike: and which said last mentioned charter, granted by King *James* the Second, was and is in the words following."

The charter was then set out. It incorporated the *Master, Pilots and Seamen of the town of Newcastle upon Tyne, in the county of Newcastle upon Tyne*, by that name (a). It also made regulations for appointing pilots, "for the bringing up and carrying down the river *Tyne*, and in and out of all or any other the creeks and members" "belonging to the said town and port of *Newcastle upon Tyne*, all ships" &c. "And, whereas by the frequent and dangerous incursions of the sea upon the port of *Newcastle* the Society are put to necessary and extraordinary charges for the prevention and repair of the ruins thereby daily growing, We are willing, for their

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(a) The name was not uniformly given in the charter.

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better assistance therein, that, for the future, they may receive some reasonable payments and allowances in that behalf. Our will and pleasure therefore is, and We do hereby, for Us, Our heirs and successors, declare and grant unto the said Master, Pilots and Seamen, and their successors, that it shall and may be lawful to and for the said Master, Pilots and Seamen” “to demand, receive, perceive and take, of the owner, part-owner, master, purser or factor of every ship or vessel so by them or any of them to be conducted as aforesaid, being loaden, for every foot which such ships or vessels, so by them to be conducted and loaden, shall draw, 12*d.* of lawful money of *England*, as hath been usually received and taken by the said Company; and also the sum of 6*d.* more of like money of all strangers and aliens only, over and besides the said 12*d.* in this behalf formerly paid; and, for every foot which such ships or vessels which shall be light, being so conducted, shall draw, 8*d.*, as formerly the said Company have usually taken; and also the sum of 4*d.* more of like money of aliens or strangers only, over and besides the said 8*d.* in this behalf formerly received. And furthermore, of Our like abundant grace, certain knowledge and mere motion, We, for Us, Our heirs and successors, have given, granted and confirmed, and, by these presents, do give, grant and confirm, unto the said Master, Pilots and Seamen, and their successors, that all person and persons, as well subjects as strangers born, being owner or owners of any goods, wares, commodities or merchandizes, which shall at any time or times hereafter be brought in any ship or vessel from beyond the seas into the said river of *Tyne*, or the creeks or members aforesaid, or any creek or member belonging to the said port of *Newcastle upon Tyne*, shall, from time

to time, as often as such goods, wares, commodities or merchandizes shall be so brought in, pay or cause to be paid to the said Master, Pilots and Seamen, and their successors," "an ancient duty heretofore lawfully, accustomably and usually paid to the said Company, Mystery, Brotherhood and Society, called primage: that is to say, 2*d.* of every tun of wine, oil and all other goods, wares, merchandizes and commodities, rated and accounted by the tun (fish killed and brought in by the *Englishmen* only excepted); and 3*d.* for every last of flax, hemp, pitch, tar or any other goods, raff, wares, merchandizes and commodities whatsoever, rated and accounted by the last in manner and form following: that is to say, aliens and strangers born, and all other such person or persons which, with their said ships or vessels, shall arrive within the said port, or in any of the said creeks or members, and not belonging to the same, before they depart with their ships or vessels from the said ports or forth of the said creeks, shall pay the duties aforesaid for and in the name of primage as is aforesaid; and every free merchant and other inhabitant of *Newcastle* aforesaid, arriving with their said ships or vessels within the said river of *Tyne*, shall pay the duties aforesaid within ten days after the landing of the said goods as aforesaid, upon lawful demand by the said Master, Pilots and Seamen, of their officers" &c.: "which said duty, called primage, and whatsoever sum or sums hereafter shall so accrue unto the said Master, Pilots and Seamen, and their successors, or otherwise shall arise and happen unto them by fines, forfeitures and amercia-ments amongst themselves, or otherwise howsoever, shall be to the only use, commodity and profit of the said Master, Pilots and Seamen, and their successors."

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The charter then contained directions as to the application of the funds by the Corporation to repairing the *Trinity House*, in *Newcastle*, to aiding twelve poor persons of the Corporation, or their wives, and to the relief of shipwrecked seamen. "And further, of Our like certain knowledge, special grace and mere motion, for Us, Our heirs and successors, We do grant and confirm unto the said Master, Pilots and Seamen, and their successors, the house called the *Trinity House*, with the said appurtenances, and all other lands, tenements, hereditaments, privileges, perquisites, ancient duties and profits, which the said Company, Mystery, Brotherhood and Society have heretofore lawfully had and enjoyed, or whereof they, or any of them, or any other to and for their uses, have heretofore been lawfully seised or possessed, and which the said Company, Mystery, Brotherhood and Society, at the time of this Our grant, do lawfully perceive, have, hold and enjoy. Provided always, and Our Royal intent and pleasure is, that the several and respective sums of money hereby granted, or mentioned to be granted, or confirmed, to and for the several and respective uses, ends, intents and purposes aforesaid, are and shall be, and that they be received and taken, in lieu of all other duties, allowances, payments and sums of money heretofore granted or received in that behalf: and that no further or other duties, or sum or sums of money, shall be at any time or times demanded, paid or received, upon account, or for or in respect thereof, anything in these presents contained to the contrary in anywise notwithstanding." (1st July 3 Ja. 1.) The bill then further stated that "the said plaintiffs further produced and gave in evidence to the said jury certain receivers' books, containing divers

entries of receipts of primage at *Newcastle upon Tyne*, on account of the said plaintiffs, from the year of our Lord 1584 to the year of our Lord 1590; and certain other receivers' books containing entries of receipts of light dues and primage at *Sunderland*, on account of the said plaintiffs, from the year of our Lord 1785 to the year of our Lord 1794. And the plaintiffs called several witnesses, who gave evidence, before the said jury, of the receipt of primage by and on behalf of the said plaintiffs at *Sunderland*, between the year of our Lord 1794 and the commencement of the present action; and who proved that primage was paid by all persons, including persons resident in *Sunderland*, being owners of goods brought to *Sunderland*, in ships from beyond the seas. Whereupon counsel, on the part of the said defendants, insisted that evidence of usage was not admissible to aid the interpretation of the said charters, and prayed the said justices to inform the said jury that the construction of the said charter was a pure question of law; and that, according to the true construction thereof, the primage claimed by the said plaintiffs was not payable: but the said justices held and affirmed that the plaintiffs were not precluded by the charter from claiming primage in respect of goods imported into *Sunderland*, by merchants resident in *Sunderland*; and that, according to the true construction thereof, the charters were not incompatible with such claim: and that evidence of usage was admissible in support of such claim. And the said justices, by their direction to the said jury, according to their said opinion, left the consideration thereof to the jury aforesaid. Whereupon the said counsel to the said defendants made their exceptions to the said opinion of the said justices. And

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1853. the said jurors gave their verdict against the said defendants upon the issues aforesaid."

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Hugh Hill, for the plaintiffs in error (defendants below). The charter of 3 Ja. 2. is incompatible with the claim of the Corporation. Had the charter, for the first time, granted primage, such a grant, at such a date, could not be supported. Supposing the right to exist before the charter, the acceptance of the charter would put an end to the right, if incompatible with it, because a charter cannot be accepted in part; *Rex v. Westwood* (a). Now the words "that is to say" clearly limit the effect of what has preceded; that is, of the grant of primage: it is as if a limitation were to the heirs of A., that is to say to the heirs of his body. Then, after the words "that is to say," nothing occurs under which a payment is to be made by owners belonging to the creek itself: no class is mentioned except aliens and strangers, not belonging to the particular port or creek. The Court below (b) seems to have taken this view: it is also to be remarked that this is a tax, and that therefore the grant must be strictly construed. It is true that this construction, to a certain degree, makes the tax lighter in the creeks than in *Newcastle* itself: but that is explained by the circumstance that the advantages of the tax are principally given to *Newcastle*. The usage cannot explain the construction of the charter. It might explain a general term, such as "inhabitants:" but the construction of the grant itself is a question of law (c).

(a) 4 B. & C. 781. Judgment of K. B. affirmed in Dom. Proc.; *Rex v. Westwood*, 7 Bing. 1.

(b) Ante, p. 428, note (a).

(c) See *Jewison v. Dyson*, 9 M. & W. 540.

Manisty, contrà, was stopped by the Court.

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JERVIS C. J. I am of opinion that my brother *Wightman* was right in telling the jury that the plaintiffs were not precluded by the charter from claiming the primage in respect of goods imported into *Sunderland* by merchants resident in *Sunderland*, and that, according to the true construction thereof, the charters were not incompatible with such claim, and that evidence of usage was admissible in support of such claim. It is true that the charter provides that what is thereby granted shall be taken in lieu of all other duties theretofore granted or received: but the charter itself grants all ancient duties and profits which the Corporation had theretofore lawfully had and enjoyed. What those were, would be matter of evidence. But Mr. *Hill* contends that, as to primage, it is especially provided that it should be paid "in manner and form following: that is to say:" after which follows a direction as to how aliens and strangers arriving within the port or any creek, and not belonging to the same, shall pay for primage, and also how every free merchant and inhabitant of *Newcastle*, arriving in ships within the *Tyne*, shall pay it; and nothing is said as to any body else: from whence he infers that the inhabitants of *Sunderland*, coming with ships into *Sunderland*, which is a creek, are not to pay primage at all. Were his construction right, a question might be raised: but I think his construction is not right. Every body *primâ facie* is to pay primage: but particular classes are to pay within particular times. Suppose a statute were to enact that every person should pay a certain tax, and then were to specify that those who had to pay as much as ten thousand pounds should pay it in six months, and those who had to

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POLLOCK C. B. concurred.

ALDERSON B. The usage shews what has been anciently paid; and that includes payments by the men of *Sunderland* for ships entering *Sunderland*.

MAULE J., PLATT B. and TALFOURD J. concurred.

MARTIN B. I think the direction right upon Mr. *Hill's* own argument; for the usage shews what the old duties were, and the charter gives the old duties.

Judgment affirmed.

Saturday,
May 28th.

The QUEEN *against* the Inhabitants of SAINT
ANN, BLACKFRIARS.

F. resided
with her father
and as part of
his family in
the parish of *B.*

ON appeal against an order of two justices adjudicating the settlement of *Isabella Elizabeth Fribbins*, a
until, being then under the age of sixteen, she was, in 1847, taken into the workhouse of *B.* and remained there receiving relief from *B.* till 1852. At this time the father was settled in *A.*: but, having resided in *B.* for more than five years, was irremovable from *B.* In 1848, *F.*, being still in the workhouse, attained sixteen. In 1849, *F.*'s father quitted the parish of *B.* In 1852, *F.* became lunatic, and was removed from the workhouse of *B.* to a lunatic asylum. On appeal against an order of two justices, on the guardians of the Union comprising *A.*, to pay to the guardians of the Union comprising *B.* the expenses of the lunatic, the Sessions confirmed the order, subject to a case stating the above facts.

Held: that *F.*, being unemancipated and an infant, though above sixteen, had the same status of removeability as her father; and that, he having quitted *B.* in 1849, she then ceased to be irremovable under stat. 9 & 10 *Vict. c. 66. s. 1.*; and the order was confirmed.

lunatic who had been removed to a licensed lunatic asylum, to be in the parish of *Saint Ann, Blackfriars*, and ordering the Treasurer of the Guardians of the poor of the *City of London Union*, on behalf of *Saint Ann, Blackfriars*, to pay to the Treasurer of the Guardians of the poor of the *East London Union*, on behalf of the parish of *Saint Botolph Without Bishopsgate*, for her past maintenance, the Sessions confirmed the order, subject to a case.

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The case stated that the father of the pauper, in the year 1840, had acquired a settlement in the parish of *Saint Ann*, by renting a tenement and payment of rates, and had gained no settlement subsequently; but he had resided for more than five years continuously, up to the 20th *October* 1847, in the parish of *Saint Botolph*, so as to have then become irremovable if he had not afterwards voluntarily quitted the parish of *Saint Botolph*. The pauper *Isabella Elizabeth Fribbins* had resided with her parents as part of the family in the parish of *Saint Botolph* for more than five years next before the 20th of *October* 1847, at which date she was of the age of fifteen years. At that period she became chargeable to the parish of *Saint Botolph* (her parents not being then chargeable); and she, being of weak mind and subject to epileptic fits, was then taken into the workhouse of the parish of *Saint Botolph*, and continued therein until she became lunatic, upon which she was, on the 31st *July* 1852, duly removed to the said licensed lunatic asylum, where she remained confined when the order appealed against was made, she then being under the age of twenty one years. The pauper was unemancipated, and unmarried, and had never done any act to

1853. gain a settlement, and had no other settlement than that in the parish of *Saint Ann*, derived to her from her father. After the said pauper had been taken into the workhouse of the parish of *Saint Botolph*, in October 1847, the father continued to reside in the same way in that parish until the year 1849, when he left it and ceased to reside in it, and removed into the parish of *Saint Leonards, Shoreditch*; in which parish he was resident when the order appealed against was made. It was admitted, on the part of the appellants, that the pauper had a derivative settlement by parentage in their parish as above set out: but it was contended by them that, under stat. 12 & 13 *Vict. c. 103.*, the costs and expenses incurred for the removal and maintenance of the lunatic pauper should be borne by the common fund of the *East London Union*, comprising the respondent parish, notwithstanding that her father had ceased to reside in the respondent parish about three years before the order appealed against was made. The respondents argued that, notwithstanding stat. 12 & 13 *Vict. c. 103.*, the order appealed against was good and valid in law. The Court of Quarter Sessions thought (the derivative settlement by parentage being admitted) that, under the above circumstances, the expenses and maintenance were properly charged against the appellant parish, and confirmed the order.

If the Court of Queen's Bench should be of opinion that the view of the Sessions was incorrect, the order appealed against and the order of Sessions were to be severally quashed; otherwise they were to be confirmed.

Pashley, in support of the order of Sessions. Stat.

12 & 13 *Vict. c. 103. s. 5. (a)* directs that all the costs connected with the removal and maintenance of a lunatic pauper removed to an asylum, "who, if not a lunatic, would have been exempt from removal by reason of some provision in" stat. 9 & 10 *Vict. c. 66.*, shall be borne by the common fund of the Union comprising the parish wherein such pauper lunatic was resident at the time when so removed. The material question then is, whether the lunatic, in the present case, was removeable from *Saint Botolph* on 31 *July 1852*. As her father, if he had returned and become chargeable, would have been removeable, she who was one of his family was removeable; *Regina v. Pott Shrigley (b)*. If she had been emancipated, it would have been a different case; but an infant continues a member of the family of the father until emancipation. There is nothing here to shew such emancipation. [Lord *Campbell C. J.* She continues a member of her father's family till she attains the age of twenty one, unless there be something to shew that she has contracted some relation inconsistent with the continuance of the relation of father and member of the family. It will be convenient to postpone your further argument till Mr. *Huddlestone*, for the other side, has stated the point on which reliance is placed.]

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Huddlestone, *contra*. At the time when the order was made, the pauper had in fact resided more than five years in the parish of *Saint Botolph*, exclusive of all the period during which relief was given. She attained the

(a) Continued by stat. 13 & 14 *Vict. c. 101. s. 1.* and stat. 14 & 15 *Vict. c. 105.*

(b) 12 *Q. B. 143.*

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age of sixteen in 1848. Stat. 9 & 10 *Vict. c. 66. s. 3.* enacts "that no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed; nor shall any warrant be granted for the removal of such child, from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish." There is a proviso in sect. 1, "that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." The word children in that proviso must be read as "children under sixteen," or else sect. 3 is inconsistent with it. In the present case the father of the lunatic is not removeable; for he is not chargeable. The lunatic herself was chargeable; for, she having attained sixteen in 1848, all subsequent relief was given to her, not to her father; and the father has not been chargeable since he lost his privilege of irremoveability in 1849.

Pashley was then called on to resume his argument. Stat. 4 & 5 *W. 4. c. 76. s. 56.*, it is true, enacts that relief given to a child under sixteen shall be considered as given to its parent; but that was intended to make the parent chargeable on account of such relief being given. It was not intended to relieve the parent from his legal obligation to support unemancipated children above the age of sixteen.

Lord CAMPBELL C. J. The question in this case is,

whether the lunatic had, at the time she was sent to the workhouse, the status of irremovability from the parish of *Saint Botolph*. I am of opinion that she had not. At that time she was an infant and unemancipated: and her father no longer had the status of irremovability; for he had ceased to reside in the parish of *Saint Botolph*. The question, therefore, comes to be this. Can the father be removeable, and an unemancipated child be irremovable? I think not. Stat. 9 & 10 *Vict. c. 66. s. 1.* expressly provides: "that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." That meets the present case, unless it be qualified by something subsequent; for this unemancipated child had the settlement of her father, to which he was removeable, inasmuch as his change of residence had put an end to the operation of stat. 9 & 10 *Vict. c. 66. s. 1.* in respect of himself. But Mr. *Huddleston* very properly directs our attention to sect. 3. I think, however, that sect. 3 extends the privilege of not being severed from the family to children under sixteen, in cases in which they would not follow the settlement of the person with whom they were living: as, for instance, where a child is living with its stepmother. Sect. 3 extends the proviso; it does not limit it.

ERLE J. I also think that the order should be confirmed. The case depends upon the question, whether the pauper, when chargeable in the lunatic asylum, had the status of irremovability: and I think she had not. She was an unemancipated child, part of the family of

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1853. her father; and stat. 9 & 10 *Vict. c. 66.*, in the very
 section creating the status of irremoveability, sect. 1, has
 a proviso, which in my mind is equivalent to a declaration
 by the Legislature, in negative terms, that such a
 child, being part of the family, shall not be considered
 removeable, or irremoveable, in such a way as to part it
 from the father. Mr. *Huddleston* argues that this is
 applicable only to children under sixteen, and, in effect,
 that a child of seventeen acquires or loses the status of
 irremoveability under circumstances when a child of
 fifteen does not do so. But there is no general enactment
 that an unemancipated child, on attaining sixteen,
 loses any privilege which it had before that age as part
 of the family of its parent.

CROMPTON J. I am of the same opinion. I see
 nothing in sect. 3 to alter the construction to be put
 upon the proviso in sect. 1. Sect. 3 obviates doubts,
 and extends the privilege of not being severed from the
 family to bastards whilst under sixteen, and to other
 cases: but it does not narrow the operation of sect. 1.

Order confirmed.

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The QUEEN *against* MATTHEW KNAPP Esquire *Saturday,*
 and The Reverend DANIEL BAXTER LANGLEY, *May 28th.*
 two Justices for BUCKS.

ON appeal against a conviction of *Matthew Cross* for having, on *Sunday 7th November*, being a person licensed to retail spirits under stat. 9 G. 4. c. 61., kept open his house in the parish of *Newport Pagnell* during the usual hours of afternoon Divine service in the church of that parish, contrary to the tenor of his license, the Sessions quashed the conviction, subject to the following case.

At the trial of the appeal, it appeared that the appellant was the landlord of a public house in the parish of *Newport Pagnell*; and that, on *Sunday 7th November 1852*, at half past 6 o'clock P.M., his house was open for the reception of customers. At the time of the passing of stat. 9 G. 4. c. 61., two services used to be performed in *Newport Pagnell* church on a *Sunday*, one commencing at 11 o'clock A.M., and the other at 3 o'clock P.M., and terminating about 5 P.M.; and this continued to be the case until the year 1836, when the present vicar accepted the appointment of chaplain to the *Newport Pagnell* Poor Law Union. After he was so appointed, he performed three services in the course of

that the conviction was for keeping his house open during the service commencing at 6 P.M.

Held, that the expression in the license, under stat. 9 G. 4. c. 61., "usual hours of" "afternoon Divine service" meant usual hours of Divine service if in the afternoon; and that the service at 6 P.M. was in the evening, not the afternoon; and that the conviction was wrong.

On appeal against a conviction of an innkeeper for, in the parish of *N.*, contrary to the tenor of his license, keeping open his house on *Sunday* during the usual hours of afternoon Divine service in the parish church of *N.*, the Sessions quashed the conviction, subject to a case: by which it appeared that the service in the parish church was formerly at 11 A.M., and at 3 P.M., but in 1826 the hours were changed, and since that time there was service in the church at 11 A.M., in the workhouse at 2 P.M., and in the church at 6 P.M., and

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the *Sunday*: the first at the parish church commencing at 11 A.M.; the second at the workhouse for the inmates and officers of the Union, commencing at 2 P.M.; and the third at the parish church, commencing at 6 P.M. and terminating about 8 P.M. The 3 o'clock service in the parish church was discontinued; and notice of the discontinuance and of the commencement of the 6 o'clock service was publicly given in the church. This state of things has continued until the present time. The conviction of the said justices was quashed by the Court of Quarter Sessions, subject to the opinion of the Court of Queen's Bench on the above case.

The question for the opinion of the Court is, Whether the Divine service in the parish church of *Newport Pagnell*, which commenced at 6 o'clock P.M. and terminated about 8 P.M. on *Sunday* the 7th of *November* aforesaid, was an afternoon Divine service within the meaning of the aforementioned statute. If the Court are of opinion that it was, then the order of Quarter Sessions is to be set aside, and the conviction of the said appellant by the said justices is to be held good: but, if the Court are of a contrary opinion, then the order of Quarter Sessions quashing the aforesaid conviction is to stand confirmed.

Badeley, in support of the conviction. Stat. 9 G. 4. c. 61. s. 21. gives the jurisdiction to convict any person, licensed under that Act, of any offence against the tenor of his license. Sect. 13 requires that the license shall be in the form given in Schedule C. to that Act. Amongst the provisions in the license contained in Schedule C. is one that the person licensed "do not keep open his or her house except for the reception

of travellers, nor permit or suffer any beer or other exciseable liquor to be conveyed from or out of his [*or her*] premises, during the usual hours of the Morning and Afternoon Divine Service in the Church or Chapel of the Parish or Place in which his [*or her*] house is situated, on *Sundays, Christmas Day, or Good Friday.*" The proper term for the service performed in the afternoon in the church is "Evening Service." No particular hour is fixed, either by statute, or by the canons of the Church: it is left to the incumbent, subject to the controul of his ecclesiastical superiors, to fix a convenient time. And the hour of Divine service in the afternoon in *Newport Pagnell* church has for many years been at six o'clock. That certainly has now become the usual hour in that parish. The object of the statute must have been to preserve decency, by closing the public houses in each parish at the hour when it is customary in that parish to have the evening service in the church. [*Crompton J.* Had the words been "during the usual hours in which evening service is performed" in the church, it would have shewn the Legislature meant what you say. But, if the words "the usual hours of" "the afternoon Divine service" mean "the usual hours in the afternoon during which evening service is performed, if service be performed in the afternoon in that church," it would seem necessary for you to say that the afternoon extends to midnight.] If the Legislature meant anything else than evening service, they would have used words to shew where the afternoon was to stop and the night begin. The evil to be apprehended from the public houses being open during the usual hours of Divine service is as great, or perhaps greater, when the service is late; and both the letter and the spirit of

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1853. <hr style="width: 100px; margin: 0;"/> The QUEEN v. KNAPP.	the statute require the words to be read as meaning the usual hours of Divine service after twelve o'clock in the day.
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Prendergast, contra, was not called upon to argue.

Lord CAMPBELL C. J. This is, no doubt, a case of importance: but, if we were to adopt the construction contended for, this very proper and useful Act might lead to very inconvenient consequences. It might be penal to sell beer for the supper of a labourer at any hour up to midnight, if Divine service was usually celebrated at that hour in that parish. I do not think the Legislature had any such intention. It is most properly enacted, as a condition in the license, that the innkeeper shall not keep open his house, except for the reception of travellers, nor permit liquor to be taken from his premises, "during the usual hours of the Morning and Afternoon Divine Service in the church" of the parish on *Sundays, Christmas Day or Good Friday*. This is a most useful enactment: but the Legislature has used language carefully limiting the obligation to what are the usual hours of afternoon service; and the Sessions have properly come to the conclusion that six o'clock is not within the usual hours of afternoon service. Mr. *Badeley* truly says that no time is limited for evening service, which from its nature is appropriate for the conclusion of the day. At the Reformation, nones, complines, and other services were abolished, and morning and evening service retained. But the Legislature has not said that it shall be penal to keep open an inn during evening service, but during afternoon Divine service. I must take judicial notice

of what was the ordinary sense of the terms used in the Act at the time when it passed. We well know that, then and now, a distinction is in common language made between afternoon church and evening church: and I must take notice that such was the case. Was then this evening service, performed at six o'clock, afternoon service? No: it certainly was evening service. In the parish of *Newport Pagnell* since 1836 there is no afternoon service in the church; it is in the workhouse; and the hours at which the evening service is performed in the church are no more the usual hours of afternoon Divine service than they would be if the afternoon Divine service, instead of being performed in the workhouse, was performed in the church. I cannot suppose that the Legislature ever intended to give the incumbent, even with the high sanction of his ordinary, power to vary the usual hours of afternoon service.

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ERLE J. The question is, what was the usual hour of afternoon Divine service. The word "afternoon" has two senses. It may mean the whole time from noon to midnight; or it may mean the earlier part of that time as distinguished from the evening. I think that in this Act it is used in the latter sense, and that the intention of the Legislature was to prohibit the opening of the public houses during the usual hour of Divine service in the afternoon, if there was one in the church. In *Newport Pagnell* Divine service in the afternoon was in the workhouse.

CROMPTON J. I am of the same opinion. We are in effect asked to alter the words of the Act, and, for usual hours of afternoon Divine service, to read usual

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hours of evening service. It seems to me that the construction put by us on the Act is a reasonable construction. Any person in *Newport Pagnell*, if asked whether there was afternoon service in the church, would answer: "No: there is evening service in the church at six; but there is afternoon service in the workhouse at two." I think that we should strain the words used, if we construed them so as to support this conviction.

Conviction quashed.

Monday,
May 30th.

WOODWARD qui tam. *against* WATTS.

Action for penalties under stat. 18 G. 2. c. 20., for acting as a justice of the peace without being qualified. On the trial it appeared that an estate, of more than 300*l.* a year, was held in trust for defendant's wife for life, remainder in trust for defendant for life, remainder in trust for the children of the marriage.

Held that this did not qualify him.

ACTION, qui tam., for penalties under stat. 18 G. 2. c. 20. s. 3., against defendant for acting as a justice of peace of the county of *Lancaster*, without being duly qualified.

Plea: Not Guilty. Issue thereon.

At the trial, before *Martin B.*, at the last Assizes at *Lancaster*, it appeared that the defendant had acted as justice. An estate of more than 300*l.* a year was held under a devise to trustees, in trust for defendant's wife during her life, and, after her death, in trust for defendant for life, remainder in trust for the children of the marriage. He had no other qualification: his wife was living. The learned Judge directed a verdict for defendant, with leave to move to enter a verdict for plaintiff. *Bliss*, in the ensuing term, obtained a rule Nisi accordingly.

Edward James and *Manisty* now shewed cause. Stat. 5 G. 2. c. 18. s. 1. enacted that no person should act as

justice, "who shall not have an estate of freehold or copyhold to and for his own use and benefit, in possession, for life, or for some greater estate, either in law or equity, or an estate for years, determinable on one or more life or lives, or for a certain term originally created for one and twenty years, or more, in lands, tenements or hereditaments" of the clear yearly value of 100*l*. Stat. 18 *G. 2. c. 20.* was passed to relax this. Sect. 1 enacts that no person shall act as justice, "who shall not have, either in law or equity, to and for his own use and benefit, in possession, a freehold, copyhold, or customary estate, for life, or for some greater estate, or an estate for some long term of years determinable upon one or more life or lives, or for a certain term originally created for twenty one years, or more, in lands, tenements, or hereditaments, lying or being in that part of *Great Britain* called *England*, or the Principality of *Wales*, of the clear yearly value of 100*l*, over and above what will satisfy and discharge all incumbrances that affect the same, and over and above all rents and charges payable out of, or in respect of the same; or who shall not be seised of, or intitled unto, in law or equity, to and for his own use and benefit, the immediate reversion or remainder of and in lands, tenements, or hereditaments, lying or being as aforesaid, which are leased for one, two, or three lives, or for any term of years, determinable upon the death of one, two or three lives, upon reserved rents, and which are of the clear yearly value of 300*l*." The question in this case is, whether an estate of more than 300*l* a year, settled in trust for the defendant's wife for her life, remainder in trust for the defendant for life, is a qualification within that section, living the wife. It may be said that the defendant derives no present revenue from the

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estate: but that is no test. By sect. 13, peers, privy councillors, judges and the eldest sons or heir apparent of any peer or of any person qualified to serve as knight of the shire are qualified. These persons have not necessarily any lands; indeed the eldest son or heir apparent of a peer or a knight of the shire is probably possessed of nothing but in expectancy: and the intention of sect. 1 seems to be to place a younger son, on whom an estate is settled, in the same position as an heir apparent. [Lord Campbell C. J. A vested remainder is a saleable interest on which money may be raised; and therefore he who is possessed of it has a better pecuniary qualification than an heir apparent. But it is unnecessary to seek for cases in which the more rigid construction of sect. 1 would work hardship; for the case at bar is as hard as any can be. Can you bring the defendant's case within the words of the statute?] It is a remainder, and so within the words, and also within the spirit. In *Becke v. Smith* (a) Parke B. says: "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." [Crompton J. That has been called the golden rule for the construction of statutes; and no doubt it is an admirable one. But I have observed that, in every case on the construction of a statute, both sides cite that rule and claim it as in their favour; so that the

(a) 2 M. & W. 191. 195.

golden rule is not of much practical use.] In the present case the words are "reversion or remainder:" what follows as to reserved rents must be applied only to the reversion, as a rent cannot be reserved to a remainder man. [*Erle J.* Is that so? We have very often had before us cases arising out of the settlement of the Earl of *Egremont* (a). There the Earl devised very large estates to one son in strict settlement, with remainder over to other sons successively: and he gave a power to the tenant for life in possession to let the estates for lives on reserved rents. The tenant for life did do so, and died; and the remainder man, though entitled to the reserved rents on estates extending over half a county, would not have been qualified by estate to act as a justice under stat. 5 *G. 2. c. 18*. I should think stat. 18 *G. 2. c. 20. s. 1*. was framed to meet such a case, and that, when the first tenant for life died not leaving issue male, his successor was entitled to "the immediate remainder" in lands leased for "lives, upon reserved rents." On the other construction, every estate of 300*l.* a year which is not held in fee simple would qualify two persons, the tenant for life or in tail, in possession, and also the remainderman. Lord *Campbell C. J.* It could hardly be intended that, if an estate of 300*l.* a year was held in tail by *A.*, remainder to *B.*, that *B.* should be qualified in respect of a remainder which *A.* could defeat at pleasure, and which, if *A.* had children, would be of little value. How do you read the words of sect. 1 so as to bring the present case within them?] It may be made perfectly

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(a) See *Doe dem. The Earl of Egremont v. Forwood*, 3 Q. B. 627; *Doe dem. Lord Egremont v. Stephens*, 6 Q. B. 208; *Doe dem. Lord Egremont v. Burrough*, 6 Q. B. 229; *Doe dem. Earl of Egremont v. Williams*, 11 Q. B. 688; *Doe dem. Earl of Egremont v. Courtenay*, 11 Q. B. 702; *Doe dem. Biddulph v. Poole*, 11 Q. B. 713; *Doe dem. Lord Egremont v. Langdon*, 12 Q. B. 711.

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intelligible by reading the words "hereditaments" "which are leased &c." as meaning "hereditaments including those which are leased." Or it may be construed thus. The first part of the section qualifies those in possession of an estate of 100*l.* a year; the second part qualifies those who have the remainder in such an estate if of 300*l.* a year, and also those in reversion to an estate leased for lives on reserved rents. Then, *reddendo singula singulis*, all that refers to rents may be read as applicable to reversions only, and not to remainders.

Bliss and *Cowling* were not called upon to support the rule.

LORD CAMPBELL C. J. I regret to say that I do not see how it is possible, putting a just construction on the Act, to say that the defendant is qualified. By stat. 5 *G. 2. c. 18.* a qualification of an estate of 100*l.* a year in possession was required. It is clear that the defendant is not qualified under that statute. But stat. 18 *G. 2. c. 20.* very reasonably relaxed the strictness of the qualification. By sect. 13 it exempts certain classes entirely from the necessity of having a qualification by estate, so that judges, for instance, may act as justices of the peace though possessed of no land. And sect. 1 extends the qualification by estate. It makes certain estates in immediate reversion or remainder give a qualification, but not all estates in immediate reversion or remainder. First, the estate must be of the value of 300*l.* a year; but the conditions do not stop there. If they did, an estate tail in *A.*, remainder to *B.*, would, if of the proper value, give *B.* a qualification, though *A.* had ten children. But the section says it shall be in lands "which are leased for one, two, or three lives, or

for any term of years, determinable upon the death of one, two, or three lives, upon reserved rents." Now, unless the lands fall within this description, the remainder man is not qualified. I do not see how this description is to be made to apply to the lands devised in trust for the defendant's wife for life, remainder to the defendant for life. I cannot interpolate the word "including" as was suggested by one counsel; nor can I, as suggested by the other, in effect, reject the words "which are leased" &c. as applicable to "remainder." To do either would be to make an enactment, not to construe one. I must take the words as I find them, and, following the golden rule, construe the words so as to put a just construction on them. If this leads to hardship or inconvenience, the remedy must be sought from the Legislature.

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ERLE J. The question is, whether the defendant is qualified to act as a justice of the peace. He claims to be so, because an estate of more than 300*l.* a year is devised to trustees for his wife for her life, remainder to him: and the question is, Does that constitute a qualification within the words of stat. 18 *G. 2. c. 20. s. 1.*? I take it to be clear that in construing a statute we must give effect to all the words, unless that leads to manifest absurdity or inconvenience. I think that it is clear that in no reasonable construction can the words "leased for one, two, or three lives," or the words "upon reserved rents," be applicable to this estate devised to the defendant's wife for her life. The defendant says these words need not be satisfied; for it is an estate in immediate remainder, and that is sufficient to satisfy sect. 1. But, in so doing, he gives no effect to one clause; which is contrary to every rule of construction.

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CROMPTON J. We are here in effect asked to apply the last part of what has been called the golden rule to this statute, and say that, though the grammatical sense of the words disqualifies the defendant, yet that is such an absurdity that the grammatical sense must be modified to avoid it. I cannot apply that to this case. I have great doubt as to what the Legislature may have intended; and I do not know that, if this case had been present to their minds, they would have thought this a fit qualification. But, supposing I knew what the Legislature meant, and that it was not what the words in their grammatical sense mean, still we must go farther, and find some words that may express their real intention; for I do not understand the rule of construction to go so far as to authorize us, where the Legislature have enacted something which leads to an absurdity, to repeal that enactment and make another for them, if there are no words to express that intention.

Lord CAMPBELL C. J. added: With reference to what my brother *Crompton* has said, I may remark that in the *United States* the Supreme Court has the power of annulling an Act of the Legislature if unconstitutional. In conversing with an eminent *American* lawyer, I asked him some questions about the working of that new and peculiar jurisdiction. He said that it was understood in the *United States* that our Courts did, indirectly, by construing statutes so as to avoid absurdity or injustice, controul the Act of the Legislature to the same extent. I am glad to have the opportunity to disclaim any such jurisdiction on our part.

Rule absolute.

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JOSEPH POLLARD and THOMAS POLLARD *against* Monday.
WILLIAM BERNARD OGDEN, one of the public May 30th.
officers of The NORTHUMBERLAND and DURHAM
District Banking Company.

ACTION for money lent, against the public officer of
The Northumberland and Durham District Banking
Company. Pleas: Never indebted; Payment; and
Set-off on a bill for 300*l.*, drawn by plaintiffs on *John*
Hall, accepted by him, and indorsed by plaintiffs to
The Northumberland and Durham District Banking
Company, and not paid by the acceptor on maturity.
Issues thereon.

On the trial, before *Cresswell J.*, at the last *Newcastle*
Assizes, it appeared that the plaintiffs were customers
of the defendant's bank; and that the action was brought
to try the right of that bank to debit the plaintiffs with
300*l.*, the amount of a bill of exchange. It was admitted,
on both sides, that, if the bank were entitled so to debit
the plaintiffs, the money in their hands was accounted
for, and that, if the bank were not entitled so to debit
the plaintiffs, the latter were entitled to recover 300*l.*

In an action by the customer of a bank against the bankers, to try their right to debit him with a bill, it appeared that plaintiff was drawer of the bill, which was accepted payable at the bank. The plaintiff discounted the bill with the bank and indorsed it to them; they rediscounted the bill and indorsed it to the redis-counter. On the maturity of the bill, it was presented by the holder at the bank along with several other bills payable there, all of which bore the bank's indorsement. The bank paid the amount of the whole without any indication of whether they paid as indorsers or as agents for the acceptors. The account of the acceptor of this bill was at this time overdrawn; he stopped payment on that day; and, on the next, notice of dishonour was given by the bank to plaintiffs, and they were debited with the amount. It was left to the jury to say, whether the bank paid the bill on their own account as indorsers, or as agents of the acceptor. The jury found that they paid as indorsers; and the bank had a verdict.

Held: that the question was properly left: that the bank had a right to pay the bill as indorsers, reserving to themselves time to inquire whether they would honor the bill or not; that it was a question of fact whether they intended to do so; and that there was no obligation on them to inform the holders in what capacity they paid.

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with interest from the time when the bank debited them with the bill. The facts appeared to be as follows.

The bill in question was drawn, on 25th May 1852, by plaintiffs on *John Hall*, payable to the order of plaintiffs, at three months. *Hall* accepted it, payable at the defendant's bank, where he had an account. The plaintiffs had the bill discounted by the defendant's bank, and indorsed it to them. It appeared that the bank are in the habit of obtaining advances from the *Bank of England*, as a security for which they indorse bills to the *Bank of England*; and this bill was so indorsed by the defendant's bank to the *Bank of England*. The practice, between the banks, was that on each morning the clerk of the branch of the *Bank of England* took to the defendant's bank all the bills payable there that day of which the *Bank of England* were holders, and left them there for examination, and again called in about a quarter of an hour for payment. The practice at the defendant's bank was that their clerk examined all such bills: those which were indorsed by the bank were paid at once; and the accounts of the acceptors were afterwards examined, to see whether the defendant's bank had or had not funds in their hands belonging to the acceptors. Those which were made payable at the defendant's bank, but not indorsed by them, were examined with the accounts of the acceptors before the bank paid them. On *Saturday, 28th August*, when the bill in question became due, thirteen other bills, payable at the defendant's bank, were in the hands of the *Bank of England*. All those bills bore the indorsement of the defendant's bank; and the whole amount of the fourteen bills was paid by one cheque for 1360*l.* 12*s.*, nothing being said or done to indicate to the *Bank of*

England on what account that sum was paid by the defendant's bank, whether as indorsers of dishonoured bills, or as agents for the acceptors. *Hall's* account was, on the 28th *August*, overdrawn. He stopped payment on the afternoon of that day. On *Monday* the 30th, when the bank opened, notice of dishonour was sent to the plaintiffs; and they were debited with the amount of the bill. The learned Judge left it to the jury to say whether the payment by the defendant's bank on *Saturday* 28th *August* was made by the bank as agents for the acceptor or on their own behalf as indorsers, telling them that the defendants were not bound to tell the holders of the bill on which account it was paid. The jury found that the payment was made on account of the indorsement. The learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for plaintiffs for 300*l.*, with interest from *August* 28th, if the question was one of pure law, and the law was in favour of plaintiffs.

Watson, in *Easter* Term, obtained a rule *Nisi* to enter a verdict accordingly, or for a new trial on the ground of misdirection, contending that the question of fact, if any, ought to have been, Whether the defendant's bank indicated to the holders an intention not to honour the bill.

Knowles and *Manisty* now shewed cause. Payment to the holder of a bill by the banker at whose house it is made payable is not necessarily made on account of the acceptor. Even where the banker has debited the acceptor with the amount, the transaction may be explained, and it may be shewn that the payment was

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with a different intention; *Deacon v. Stodhart* (a). Had the bill not been indorsed to the *Bank of England*, so that the defendant's bank had remained holders when it became due, they might without any presentment have treated the bill as dishonoured; *Bailey v. Porter* (b): they were entitled to pay the *Bank of England* as indorsees from them, and so replace themselves in the position they would have been in if they had never indorsed it at all. The question, whether they made the payment with this intention or as intending to pay for *Hall*, the acceptor, was necessarily one for the jury; *Graves v. Key* (c). It is said that the question ought to have been, Whether the defendant's bank indicated at the time to the *Bank of England* that they paid as indorsers: but it was immaterial to the holder why they paid; and therefore there was no occasion to indicate what their intention was.

Watson, Byles Serjt. and Unthank, in support of the rule. The *Bank of England* presented the bill on its maturity to the defendant's bank, not as treating them as indorsers of the bill or as demanding payment from them in their own right, but, in conformity with the directions on the bill, to them as agents of the acceptor, *Hall*, and for the purpose of charging him. The defendant's bank, who on such a presentment paid without explanation, must be taken to have paid in the capacity in which the presentment was made to them. The legal effect of a payment by the defendant's bank as indorsers would be to make the delivery up of the bill a retransfer to them-

(a) 2 M. & G. 317.

(b) 14 M. & W. 44.

(c) 3 B. & Ad. 313.

selves; but the holders never assented to a retransfer; for no request was made to them do so. Possibly, the defendant's bank might have treated the payment to the *Bank of England* as a defeasible payment, liable to be retracted at any time during the same day; but on the *Monday* it was too late; for the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill; *Cocks v. Masterman* (a).

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Lord CAMPBELL C. J. I think the rule must be discharged. The question is, Whether the defendants have a right to set off the amount of this bill. That depends upon whether the bill was paid on behalf of the acceptor *Hall*. The jury found that it was not; and I am of opinion that it was a question for the jury, and not a question of pure law for the Judge: and, on the finding of the jury, we must take it that the defendant's bank paid on the *Saturday* as indorsers. I think that an indorser, on the day when the bill becomes due, may pay his indorsee, and on the bill being dishonoured charge a prior indorser on giving him notice of dishonour. In this case the question was, Whether the defendant's bank on the *Saturday* paid the holder as indorsers or as agents of the acceptor. The jury, finding that they did not pay as agents of the acceptors, find what is tantamount to a dishonour of the bill on that day. The defendant's bank give the plaintiff, *Pollard*, who was an indorser to them, notice of dishonour on the next day: that was regular; and he was liable to them.

(a) 9 B. & C. 902.

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ERLE J. I think it is clear law that the holder of a bill indorsed to him by a bank at which the acceptor has made it payable may, if the bank choose to dishonour the bill, receive payment forthwith from the bankers in their capacity of indorsers: and it seems not disputed that, if the defendant's bank in this case had expressly said to the holder that they had no effects of the acceptor, but paid as indorsers, they would have been entitled to charge the plaintiff with the amount. They did not say this; but it is clear to my mind that they meant to reserve to themselves the right to examine into the state of the accounts and determine whether they would honour the bill or not. The defendant's bank might have said to the holder: "we require a reasonable time to examine into the state of the accounts between us and the acceptor before we either honour or dishonour this bill; but in case we determine to dishonour it we shall be liable to you as indorsers; therefore, to save trouble, take your money; if we honour the bill you are paid; if not, we have taken it up as indorsers of a dishonoured bill." Now, if this had been said, there would have been no case for the plaintiffs: and I have been able to discover no reason why, if such was the intention of the bankers, any expression of this sort to the holder should be required. I have listened attentively, that it might be pointed out to me that there was some possible state of things in which it might be material to the holder to know in which capacity the bankers paid him: but no such state of things has been suggested.

CROMPTON J. The point is exactly the same as if the defendant's bank had sued *Pollard* as indorser of this

bill, and he had pleaded that at maturity it was paid by the acceptor, and the jury had found it was not so paid. It is said that what the defendants here did was a defeasible payment for the acceptor, liable to be retracted at any time during the day, but not after: but I think it never was a payment for the acceptor at all. It is also said that the holder is entitled to know on the very day on which the bill becomes due whether it is honoured or not. So he is, when he could sustain any prejudice in consequence of not knowing: but, when he gets the money and is entitled to keep it, I do not see on what ground it should be necessary to tell the holder on what account the money is paid. I think therefore that in this case it was a question of fact properly left to the jury.

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Rule discharged.

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Wednesday,
June 1st.

The QUEEN, on the prosecution of the Trustees appointed to carry into execution stat. 53 G. 3. c. lxxxiv., relating to the Parish of ALL SAINTS, POPLAR, *against* The EAST and WEST INDIA DOCKS and BIRMINGHAM JUNCTION RAILWAY COMPANY.

Mandamus to
a Railway
Company
whose special
Act incorporated the General Acts of

MANDAMUS. The writ recited the provisions of *The East & West India Docks & Birmingham Junction Railway Company Act, 1846 (a)*. Suggestions,

1845. The writ suggested that there was a street and "turnpike road" across which the line of the railway was made: that the Company constructed a bridge, on which the said street "and turnpike road" was carried over the line: and that they made the ascent to the bridge with a greater gradient than one foot in thirty. And that the Company deviated vertically more than two feet from the level of the line as shewn on the plans &c., with reference to the datum line: and that the street was affected by such deviation, which was made without the consent of those who had the controul of the street. The writ then commanded the Company to "make and construct the ascent to the said bridge as by law you are bound to do, and in conformity with the regulations of the Railways Clauses Consolidation Act, 1845," and also to make the levels of the railway as referred to the datum line, and any deviation therefrom in conformity with the regulations of the Railways Clauses Consolidation Act, 1845.

Return, *inter alia*: That the street was not a turnpike road; that defendants had not deviated; that the street was not affected by such deviation; and that defendants had made the ascent as by law they were bound to do. Each of those allegations were traversed separately. Special verdict: that the street was a road of great traffic, but not maintained by tolls, or under the jurisdiction of any Turnpike Trustees: that there was a vertical deviation of more than two feet, and that in consequence it became necessary to erect the bridge higher than would otherwise have been necessary, and that the street was affected thereby: and that the gradient was more than one foot in thirty feet and less than one in twenty.

Held: that the street was not a turnpike road: that therefore the gradient was right, and the part of the writ commanding defendants to make the ascent to the bridge as by law they ought could not be supported, as that part of the command was unfounded.

Held also; that, as part of the command in the writ could not be supported, the writ must fail altogether.

Per Lord Campbell C. J. The proviso in the Railways Clauses Consolidation Act, 1845, s. 16., that in exercise of their powers the Company shall do as little damage as can be, relates to the mode of doing works authorized to be done, but does not regulate what those works shall be.

(a) Stat. 9 & 10 Vict. c. cccxcvi., local and personal public. Sect. 1 incorporates the General Acts of 1845, stat. 8 & 9 Vict. c. 16., stat. 8 & 9 Vict. c. 18. and stat. 8 & 9 Vict. c. 20.

that, at and before the passing of the special Act, "there was a certain common street and public highway and turnpike road in the parish of *All Saints, Poplar*, called *High Street, Poplar*." And that the Trustees appointed for carrying into execution stat. 53 G. 3. c. lxxxiv. (a) have the controul of all the streets &c. within the Hamlet of *Poplar* and *Blackwall*. And that, by stat. 57 G. 3. c. xxxiv. (b), the Hamlet of *Poplar* and *Blackwall* was converted into a parish by the name of *All Saints, Poplar*. And that on the plans and sections, deposited before obtaining defendant's special act, was delineated a certain datum line; "and the proposed line of railway was described, delineated and shewn on the said plans and sections as intended to be situate 39 feet 6 inches and no more above the said datum line." And that the defendants made their line to pass through *High Street, Poplar*, and constructed a bridge on which the "said common street and public highway and turnpike road was carried over the said line of railway: and that you

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Sect. 3 incorporates the defendants by the above title.

Sect. 19. "And whereas plans and sections of the said intended railway shewing the lines and levels thereof, and also books of reference containing the names of owners," &c. "of the lands through which it is intended to pass, have been deposited with the Clerk of the Peace for the County of *Middlesex*: Be it enacted, that, subject to the provisions of this Act and in the said recited Act" [Sic] "contained, it shall be lawful for the said Company to make and maintain the said railway and works in the line and upon the lands delineated upon the said plans and described in the said books of reference."

(a) Local and personal, public: "For paving, lighting, watching and improving the Hamlet of *Poplar* and *Blackwall*, in the County of *Middlesex*; and for the better relief and maintenance of the poor of the said Hamlet."

(b) Local and personal, public: "For making the Hamlet of *Poplar* and *Blackwall*, in the County of *Middlesex*, a separate and distinct Parish; and for erecting a parish Church therein, and other purposes relating thereto."

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constructed and made the ascent to the said bridge with a greater degree of ascent and inclination than one foot in thirty feet, namely with an ascent and inclination of one foot in twenty feet: contrary" &c. And that, in passing *High Street, Poplar*, the defendants deviated vertically from the level of the line, as shewn on the plans and sections with reference to the datum line, to an extent exceeding two feet; and that *High Street, Poplar*, was affected by such deviation, which was made without the consent in writing of the Trustees. The writ then commanded that the defendants "do make and construct the ascent to the said bridge as by law you are bound to do, and in conformity with the regulations of the said Railways Clauses Consolidation Act, 1845, and the said several Acts of Parliament. And that you also, in like manner, make, in the said place where your said railway passes through the said common street and public highway and turnpike road in *Poplar* aforesaid, the levels of the said railways as referred to the common datum line, and as described in the said plans and sections, and any deviation therefrom in conformity with the regulations of the said Railway Clauses Consolidation Act, 1845, and the said several Acts."

The return contained seven allegations, each of which was traversed in a separate plea: namely:

That *High Street, Poplar*, is not a turnpike road.
Plea 1. Traverse thereof. Issue thereon.

That the trustees have not the controul of *High Street, Poplar*. Plea 2. Traverse thereof. Issue thereon.

That the proposed line was not delineated on the plans "as intended to be situate thirty nine feet six inches, and no more," above the datum line. Plea 3. Traverse thereof. Issue thereon.

That defendants have not deviated more than two feet when crossing *High Street, Poplar*. Plea 4. Traverse thereof. Issue thereon.

That *High Street, Poplar*, is not affected by the deviation. Plea 5. Traverse thereof. Issue thereon.

That the defendants adhered to the levels. Plea 6. Traverse thereof. Issue thereon.

That the defendants made the ascent to the bridge as by law they were bound to do. Plea 7. Traverse thereof. Issue thereon.

Special verdict.

That *High Street, Poplar*, is a macadamized road, having paved footways and a continuous line of houses on each side thereof, communicating by other streets with the *Commercial Road* on which were turnpike gates. That there was great traffic on *High Street, Poplar*. "That no turnpike tolls are, or ever were, or can, or ever could, be taken for going along the same common street or public highway; and that it is not and never was subject to the jurisdiction of any Turnpike Trustees; and never has been, and never could and cannot be by law, repaired by or out of any turnpike tolls." And the jury referred the first issue to the Court.

The second issue was found for the Crown.

As to the 3d issue, the jury said: "that the said proposed line of railway in the said writ mentioned was described, delineated and shewn in the said plans and sections as situated thirty nine feet six inches above the said datum line." And they referred the third issue to the Court.

The fourth issue was found for the Crown.

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As to the fifth issue, the jury said that, in consequence of the deviation, it became necessary to erect a bridge for carrying *High Street* over the line much higher than would have been necessary but for that deviation; which was an inconvenience to the street. And they referred the fifth issue to the Court.

The sixth issue was found for the Crown.

As to the last issue, the jury said that the ascent to the bridge was more than one foot in thirty feet, and less than one in twenty feet, and referred that issue to the Court.

Pashley, for the prosecutors. The first issue depends upon the construction to be put upon The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20.), s. 50., which enacts that, where a bridge is made for carrying a road over the railway, "the ascent shall not be more than one foot in thirty feet if the road be a turnpike road, one foot in twenty feet if a public carriage road, and one foot in sixteen feet if a private carriage road." The intention obviously was to regulate the ascent according to the amount of traffic on the roads. [Lord *Campbell* C. J. No amount of traffic can make a road a turnpike road, if it is neither maintained by turnpike tolls, nor under the jurisdiction of Turnpike Trustees.] The finding on the third issue is in favour of the Crown; the representation on the plans and sections is what is incorporated in the Act; *Regina v. Caledonian Railway Company* (a), *The North British Railway Company v. Tod* (b). And the finding on the

(a) 16 Q. B. 19.

(b) 12 Cl. & F. 722.

fifth issue is also in favour of the Crown, as the highway is affected by this, which is a deviation within the meaning of stat. 8 & 9 *Vict. c. 20. s. 11*. The finding on the seventh issue must follow the event of the first.

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Willes, contra. The first and last issues are in favour of the defendants, as the road on this finding is clearly no turnpike road. And the finding of these issues for the defendants disposes of the case in their favour. The foundation of the command to alter the ascents of the bridge is the suggestion that the road was a turnpike road. If it had been so, the gradient of more than one in thirty feet would have been illegal; but, that suggestion being found for the defendants, the gradient, not being more than one foot in twenty, is right; and there is nothing to support the command "to make the ascent to the bridge as by law they are bound to do;" for it appears on the record that this is already done. No peremptory mandamus can issue unless the whole of the mandatory part can be supported; *Regina v. Tithe Commissioners (a)*, *Regina v. Caledonian Railway Company (b)*. And the fifth issue should be determined in favour of the defendants; for the road is not affected by the alteration of the level of the line of railway. There is no provision in any of the Acts establishing a minimum height of the crown of the arch of a bridge above the line of the railway below. If the line were now lowered two feet, the bridge might still lawfully remain as it is. The finding of the jury is that it was "necessary" to make the bridge higher than would have been "necessary" had the level been lower. That is true: owing to

(a) 14 Q. B. 459.

(b) 16 Q. B. 19.

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a mistake, the Company have exercised their powers to a greater degree than they need have done: but, though they have done so, they have not exceeded their powers.

Pashley, in reply. The fifth issue is found for the prosecutors; for by The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20.), s. 16. the Company are to do "as little damage as can be;" and it is admitted they might have made a bridge doing less damage to the road. [Lord Campbell C. J. Can you support this writ, if the first issue which goes to the root of the first branch of the mandatory part is against you.] The Court will not order a peremptory mandamus, where there is an indivisible part of the thing commanded not obligatory. But, where there are two distinct and separate matters commanded, as is the case here, the writ may go for the one though not for the other.

LORD CAMPBELL C. J. I wish we could interfere to remedy a wrong; for it seems to me that the altering the level of the line of railway, the natural and almost necessary consequence of which has been to alter the level of the street, is a wrong: but we cannot, consistently with the rules of law, grant the redress prayed for by this writ. The writ proceeds on the suggestion that the street was a turnpike road, so that the gradient of the ascent was wrong, and also on the suggestion that the level of the railway was wrong. And, if such had been the facts, the whole writ would have been good. But, on the facts as found by the jury, it is clear that the street is not a turnpike road; for that is a question depending, not on whether it is an important road or

not, but on whether it is a road maintained by tolls payable by passengers; and this is not such a road. That being so, the complaint as to the gradient cannot be supported; for it is found that the gradient is not more than one foot in twenty; and, the street being only a public road, the gradient need not have been less. Therefore the first part of the mandatory part of the writ, which calls on the defendants to make the ascent to the bridge as by law they ought, has nothing to support it. And it is quite clear law that, if a writ of mandamus commands several things, it lies on the prosecutor to establish that he is entitled to a peremptory mandamus as to them all; and that, if he fails in establishing this as to any substantial part, there can be no peremptory mandamus at all. The peremptory mandamus, when awarded, must be in the same terms as the mandamus Nisi, only altering the formal part which calls for a return. In the present case, if we could grant a peremptory mandamus to lower the level of the line, it would be unavailing, as it would not cause an alteration in the bridge. But we cannot grant the peremptory mandamus commanding one part, unless we can grant it for the other. The authorities on that point are quite conclusive. So to my mind is the reasoning; but I do not repeat the reasons which were given in *Regina v. Tithe Commissioners* (a).

COLERIDGE J. I agree that the authorities and the reason are both conclusive. The first and second writ differ only in this, that the one is peremptory, the other conditional to shew cause. Such is the general rule.

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(a) 14 Q. B. 459.

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Here there is the additional reason, that a mandamus to alter the level of the railway would not remedy the grievance complained of, viz.: the altered level of the street. So soon as it appears that the road is not a turnpike road, the first part, to construct the ascent, and with it the whole writ, fails.

ERLE J. I also think that the prosecutors have failed in establishing their right to the mandamus or to the ascent: and, I think, if a writ is for two matters, and fails as to one, it fails as to both. The rule is well established; and there is no hardship in its application to the present case.

Lord CAMPBELL C. J. added: I ought to have said that I do not think the prosecutors can avail themselves of the proviso in stat. 8 & 9 *Vict. c. 20. s. 16.*, that in exercise of their powers "the Company shall do as little damage as can be, and shall make full satisfaction." I think that section does not apply to what is to be done in execution of their powers, but to the manner of doing it. The work is to be executed with as little damage as possible; and compensation is to be made for that damage: but the proviso does not affect the work to be done.

Judgment for the defendants.

1853.

The QUEEN *against* The EAST ANGLIAN
Railway Company.

Wednesday,
June 1st.

SIR FITZROY KELLY, on this day, moved (a) to make a rule for a mandamus absolute upon an affidavit of service, and that it should be absolute with costs. [Lord Campbell C. J. A separate application should be made for the costs. Such is the general practice.] It would only have the effect of increasing the costs. In *Regina v. Commissioners of the Navigation of the Rivers Thames and Isis* (b) the rule was made absolute with costs. [Lord Campbell C. J. In that case it appeared to the Court that the litigation was at an end; but I do not think we can consider the mere not shewing cause against the rule an admission that the litigation is over. The defendants may intend to make a return to the mandamus. If you renew the application on affidavits shewing that the litigation is substantially at an end, we will make the rule absolute with costs; if not, it will be absolute without costs.]

The Court will not grant costs on making a rule for a mandamus absolute, upon a mere affidavit of service: but on affidavits shewing ground for believing that the litigation is at an end, and that the defendants have had notice that the application will be made for costs, at the time the rule is made absolute, the Court will make it absolute with costs.

On a subsequent day (4th June) Sir F. Kelly renewed his application on additional affidavits, by the prosecutors' town agent and country attorney, to the effect that the rule had been enlarged at the request of the Company's agents and attorney, and that they had been informed by them that they might make the rule absolute, as the Company considered that they had, since it was granted,

(a) Before Lord Campbell C. J., Coleridge and Erle Js.

(b) Note (b) to *Regina v. The Select Vestry of St. Margaret's, Leicester*
8 A. & E. 901.

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fully complied with it; and that notice had been given to the defendants' agent, since the last application, that costs would be asked for.

On these affidavits,

Per CURIAM (a).

Rule absolute with costs.

(a) Lord Cumpbell C. J., Erie and Crompton Js.

A

Thursday,
June 2d.

GERHARD against BATES.

Nastour & Harrison 28d J 2 B 18

1st count
stated that,
before defend-
ant's promise
after men-

THE first count charged that, whereas, before and at the time of the making of the promise of defendant

tioned, defendant and others had formed a company on a principle known as a *Société Anonyme*, with 96000 shares of 1*l.*, of which 12000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from further calls: that defendant was a promoter and managing director, and in such character, in offering the 12000 shares to the public, guaranteed and promised to the bearers of those shares a minimum annual dividend of 33 per cent., payable at specified times, and that the guarantie and promise should remain in force till the 12*s.* 6*d.* should be thus repaid to the bearers. That plaintiff, confiding in the promise, became purchaser and bearer of 2500 of the 12000 shares at 12*s.* 6*d.*, and took the same on the faith of the guarantie and promise, and not otherwise, and had fulfilled the engagement on his part; and the time for payment of the 12*s.* 6*d.* by the dividends had elapsed, of which defendant had notice: yet defendant had not paid any dividend, nor any part of the 12*s.* 6*d.*: and the 12*s.* 6*d.* on each share was still unpaid to plaintiff. On demurrer:

Held: that neither privity of contract nor consideration appeared: and that the action did not lie.

2nd count stated that, before the representation by defendant after mentioned, defendant and others had formed the Company, as above; that the 12000 shares were actually offered to the public; that defendant, being such promoter and managing director, *intending to defraud, deceive and injure the public*, and to cause it to be publicly advertised that the Company was likely to be a safe and profitable undertaking, and to deceive the public who might become purchasers of the 12000 shares, and induce them to become purchasers, falsely, fraudulently and deceitfully caused it to be publicly advertised, by a prospectus issued by defendant as such director, that the promoters did not hesitate to guarantee to the bearers of the 12000 shares a minimum annual dividend of 33 per cent., and that the guarantie should remain in force till the 12*s.* 6*d.* should be thus repaid to the shareholders; the dividends to be payable at specified times: that defendant, by means of the said false, fraudulent and deceitful pretences and representations, wrongfully and fraudulently induced plaintiff to become, and plaintiff by reason thereof actually became, purchaser and bearer of 2500 of the 12000 shares at 12*s.* 6*d.*; and, by means of being so deceived, was induced to and did pay 12*s.* 6*d.* per share: Whereas the statement was false and fraudulent, to the knowledge of defendant, and defendant had

next after mentioned, defendant, and certain other persons whose names are to plaintiff unknown, had agreed together to form, and had accordingly then formed, a certain Company, upon a certain principle known as a Société Anonyme, called *The Iberian Silver Lead Ore Company*, for the purpose of smelting and refining the ores of certain mines in the kingdom of *Spain*; the capital of which said Company was divided into ninety six thousand shares of 1*l.* each; out of which twelve thousand were to be appropriated to the public at 12*s.* 6*d.* per share, free from all further calls. And whereas defendant then was, and still is, one of the original promoters and a managing director of the said Company, and, in offering the said twelve thousand shares to the public, had, in such character of director as aforesaid, guaranteed and promised to the bearers of the said twelve thousand shares at 12*s.* 6*d.* per share a minimum annual dividend of 33 per cent., payable in half yearly dividends of 16½ per cent. upon each of such shares; and that the said guarantie and promise should remain in force until the said 12*s.* 6*d.* per share should be thus repaid to such bearers of the said twelve thousand shares as aforesaid; the first half yearly dividend to be payable on 24th *December* then next: Averment that plaintiff, confiding in the said promise of defendant, after the making of the same, and before the commencement of this suit, to wit 1st *June* 1847, became and was the purchaser and bearer of two thousand five hundred of the said twelve thousand shares, at 12*s.* 6*d.* each, and took the same upon the faith of the said guarantie and promise of defendant, and not otherwise, and hath fulfilled the said agreement in all things on his part: that periods for repayment of the said sum

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no ground for offering such guarantie to the public, as he well knew: by means of which plaintiff lost the money paid for the shares. On demurrer: Held: that the damage to plaintiff was sufficiently shewn to be the direct result of defendant's fraud to entitle plaintiff to recover against defendant as for a tort.

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of 12*s.* 6*d.* on each of the said shares in the said half yearly dividends, and at and after the rates and in the manner and at the times aforesaid, and for the fulfilment of the said contract by defendant, have respectively elapsed before the commencement of this suit: of all which defendant had notice: Yet defendant hath not paid to plaintiff the said half yearly dividends of 16½ per cent. on each of the said shares, or any part thereof, nor hath he repaid to plaintiff the said sum of 12*s.* 6*d.* on each of the said shares, or any of them, or any part of the said sum of 12*s.* 6*d.* on each of the said shares, or any of them: and the said sum of 12*s.* 6*d.* on each of the said twelve thousand shares remains and still is wholly due and unpaid to plaintiff.

Second count. That, whereas, before and at the time of the making the false representation by defendant after next mentioned, defendant and divers other persons whose names are to plaintiff unknown had agreed together to form, and had accordingly then formed, the said Company in the first count mentioned, and for the purpose therein mentioned: the capital of which said Company was divided into the same ninety six thousand shares as therein mentioned; out of which twelve thousand were to be appropriated to the public at 12*s.* 6*d.* per share as therein mentioned: and which said twelve thousand shares were then actually offered to the public: and whereas defendant then was such promoter and managing director as in the first count mentioned; and, being such promoter and managing director, defendant heretofore, to wit 1st *August* 1847, intending to defraud, deceive and injure the public, and to cause it to be publicly represented and advertised that the said Company was likely to be a safe and profitable undertaking,

and also to deceive the public who might become purchasers of the said twelve thousand shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully caused and procured it to be publicly advertised and made known, in and by a certain prospectus issued by the defendant as such director as aforesaid, (amongst other things) that the said promoters of the said Company, in proposing to issue to the public the said twelve thousand shares at 12*s.* 6*d.* per share, free from all further calls, and participating conjointly with all the said other shares on the net annual profits of the said Company, did not hesitate to guarantee to the bearers of the said twelve thousand shares a minimum annual dividend of 33 per cent., payable in half yearly dividends of 16½ per cent. each: and that the said guarantee should remain in force until the said 12*s.* 6*d.* should be thus repaid to the shareholders, the first half yearly dividend to be payable on 24th *December* then next: Averment that the defendant, by means of the said false, fraudulent and deceitful pretences and representations, after the making the same as aforesaid, and before the commencement of this suit, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and bearer, of two thousand five hundred of the said twelve thousand shares, at 12*s.* 6*d.* per share; and, by means and in consequence of being so deceived as aforesaid, and by means of the several premises, plaintiff was then induced to pay, and did pay, for such two thousand five hundred shares, a large sum &c., to wit 12*s.* 6*d.* for each of the said shares: Whereas, in truth and in fact, at the time of the making the said statement, the same was false and

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fraudulent, to the knowledge of the defendant; and the defendant had no ground whatever for offering such guarantie to the public as aforesaid, as he, defendant, then well knew. By means whereof plaintiff has not only lost the use of the said moneys by him paid for the said two thousand five hundred shares as aforesaid, but is likely to lose the said moneys altogether, and the future use thereof.

Demurrer to both counts. Joinder.

The case was argued on an earlier day in this term(a).

Needham, for the defendant. The first count professes to set up a contract, but fails to do so, no privity being shewn between the plaintiff and the defendant. The guarantie and promise of the defendant is not given to the plaintiff, but to the bearers of the shares generally; and it is alleged to have been given at the time of offering the shares to the public; and, after that time, the plaintiff first became the bearer. [Lord *Campbell* C. J. The promise seems to be made to all who should become shareholders.] No action can be maintained on such a promise. An analogy may perhaps be suggested from the cases in which, a reward having been offered to any person who should perform a particular service, it has been taken for granted that the party afterwards performing it may recover as upon a contract; *Williams v. Carwardine* (b), *Smith v. Moore* (c), *Thatcher v. England* (d), *Lancaster v. Walsh* (e). Where the declaration states in terms a contract between the plaintiff and the

(a) May 27th Before Lord *Campbell* C. J., *Coleridge*, *Erle* and *Crompton* Js.

(b) 4 B. & Ad. 621.

(d) 3 Com. B. 254.

(c) 1 Com. B. 438.

(e) 4 M. & W. 16.

defendant, the only question is whether the offering of the reward and the performance of the service constitute evidence of such a contract: the declaration itself would be free from the objection now insisted upon. Such cases are therefore not applicable here. In *Levy v. Langridge* (a) the defendant sold a gun to the plaintiff's father, for the use of the purchaser and his sons, and, on the sale, warranted it, knowing it to be unsafe; and the plaintiff, knowing of the warranty, and in consequence thereof, used the gun, which burst and so injured him: and it was held that he might recover in tort. That case was discussed in *Winterbottom v. Wright* (b) and *Howard v. Shepherd* (c); and it seems to have been explained on the ground that the defendant, knowing that the sons were to use the gun, in effect warranted it to them. That explanation is inapplicable here. *Howard v. Shepherd* (c) is an authority for the present defendant: it was there held that the indorsee of a bill of lading could not recover against the ship-owner for non-delivery of the goods, the supposed tort being, in fact, founded on contract, and the contract not being transferable. The bearer of one of the shares, in the present case, stands much in the position of such an indorsee.

The second count attempts to shew a tort by facts substantially the same as those alleged in the first count. But, in the first place, it may be argued that, strictly speaking, it is not formally averred that any representation made by the defendant was false. His representation is said to be that he "did not hesitate to guarantee;" and it is not alleged that he did hesitate, or did not guarantee.

(a) 4 M. & W. 337, in Exch. Ch., affirming the judgment of the Court of Exchequer in *Langridge v. Levy*, 2 M. & W. 519.

(b) 10 M. & W. 109.

(c) 9 Com. B. 297.

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[*Coleridge J.* Surely a man, when he says "I do not hesitate to guarantee," means to say "I represent."] But it is not alleged that he did not represent. But, supposing this to be a mere question of expression, the second count in substance raises the same question as the first; it is a mere attempt to obtain in one form what cannot be obtained in another. [*Lord Campbell C. J.* Very often facts, which do not constitute an actionable breach of contract, will support an action for tort. *Crompton J.* referred to *Taylor v. Ashton (a)*.] In every case where an action for a false representation has succeeded, the representation has been of some existing fact, not of a future fact. [*Erle J.* A representation that a mine will yield so much is a representation of its present state.] This is no more than a statement of opinion. [*Lord Campbell C. J.* The declaration avers that the defendant knew that there was no ground for offering the guarantee. I see no difficulty except as to the want of privity: if the representation had been made to the plaintiff individually, there would clearly have been a tort. *Coleridge J.* Is it not a continuing representation? If so, is it not a representation made to any one who receives it?] It is made once for all, before the plaintiff knows of it. [*Coleridge J.* Suppose it were addressed to a thousand persons at once, of whom the plaintiff was one.] That might be evidence in support of an averment of a representation made to the individual. In *Shrewsbury v. Blount (b)* it was alleged that the defendants, who made the representation, intended by fraud to induce the plaintiff and others to believe the falsehood. The doc-

(a) 11 M. & W. 401.

(b) 2 M. & G. 475.

trine laid down in *Taylor v. Ashton* (a) was merely that an untrue representation made to an individual is actionable, if there be a fraudulent intention to induce him to do an act to his prejudice, which he does, though the party representing did not actually know that the representation was untrue. In such a case there is privity. [Lord *Campbell* C. J. How do you define privity?] It is that which results from an express contract between two parties, or from the relation in which they stand, one to the other. [*Crompton* J. Cannot a tort be committed against a stranger?] In *Howard v. Shepherd* (b) *Maule* J. said: "A public wrong, from which a private and particular injury results to an individual, gives that individual a right of action. But, where there is a private wrong, it is hard to say that one who sustains a private injury (but with whom no contract is made), can maintain an action." There was in the present case no public wrong in the sense in which the words are there used.

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C. Milward, *contra*. Both counts are maintainable. It appears that the Company was to be carried on upon the known principle of a *Société Anonyme*. [*Cole-ridge* J. How can we know more of that than we do of the legal qualities of a *Scotch* marriage?] At any rate, enough is alleged here to shew a guarantie which attaches on every particular person becoming a holder, and thereby creates a contract. That principle is established by the cases in which actions of contract have been held maintainable upon general promises of reward to be paid on the performance of a specified service;

(a) 11 *M. & W.* 401.(b) 9 *Com. B.* 312.

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Williams v. Carwardine (a), *Smith v. Moore* (b). The contract may also be compared to that which arises on a sale by auction, upon the published conditions of sale. [Coleridge J. How do you introduce the consideration?] The defendant, by the general announcement, puts himself in the position of a party agreeing on these terms with any individual who in pursuance of the announcement accedes to it. This is sufficient privity to support an action of either contract or tort. An acceptance of a bill stated to be by procuration is a general representation of authority given by the drawee to the party accepting; and any indorsee may recover against such party if the representation be false; *Polhill v. Walter* (c). In *Levy v. Langridge* (d), in the Exchequer Chamber, Lord Denman C. J. adopted the language used by Parke B. in the Court below (e): "As there is fraud, and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." [Coleridge J. It was there contemplated that the plaintiff would use the gun.] The case of a heap of stones placed in a public highway is analogous to this. If privity is a requisite to the right to sue, it must be so only in a sense according to which any one wronged is privy to the wrong-doer. The representation was public, and intended to be believed by the public: it is thus a "public wrong," within the criterion introduced in the argument on the other side from *Howard v. Shepherd* (g). It is argued that, if the first count fail,

(a) 4 B. & Ad. 621.

(b) 1 Com. B. 438.

(c) 3 B. & Ad. 114.

(d) 4 M. & W. 338.

(e) *Langridge v. Levy*, 2 M. & W. 532.

(g) 9 Com. B. 312.

the second count, being substantially for the same cause, must fail too : but the record shews different transactions. There may be an action in tort for an act which is a wrong only because it is a breach of contract : in such a case perhaps the person injured cannot sue unless he is a party to the contract : such appears to be the judgment of *Cresswell J.* in *Howard v. Shepherd* (a) : but that is not applicable where the duty is independent of any contract. In the second count, the fraud and its tendency are brought to the knowledge of the defendant ; and he is shewn to have contemplated the result, and to have induced the plaintiff to purchase : the case therefore is within the principle of *Levy v. Langridge* (b). [*Coleridge J.* Suppose a person, coming from abroad, publishes a false account of a mining district : could any party going out in consequence, and suffering loss, be entitled to sue ?] Not unless it were shewn that the misrepresentation was fraudulently intended to produce the injurious result, and produced it in fact. Here all those circumstances concur.

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Needham, in reply. The count on contract cannot be supported consistently with any reasonable view. Is it to be a floating contract with each successive bearer ? Can each recover though a previous bearer has recovered ? If so, how much ? From whom does the consideration move at the time of the contract ? The case of the indorsement of a bill depends upon the law merchant : the contract is not transferable where the instrument indorsed is not within the law merchant ; and, accordingly, the action does not then lie ;

(a) 9 Com. B. 321.

(b) 4 M. & W. 338.

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Howard v. Shepherd (a). As to the second count, a lecturer might as well be held liable to every one who heard him, if he stated an untruth. [Lord Campbell C. J. Fraudulently, and with the intent to produce the evil.] The action would not lie unless he meant to produce the evil to the particular individual, as in *Levy v. Langridge* (b). A man building an unsafe carriage is not liable for the harm which occurs to every one who may be injured by riding in it; *Winterbottom v. Wright* (c), where Lord Abinger complains that the decision in *Levy v. Langridge* (b) had been misapplied.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that on the first count in the declaration the defendant is entitled to our judgment. This count proceeds entirely for a breach of contract: and, unless it discloses a valid contract between the plaintiff and the defendant, it cannot be supported.

The breach alleged is, that the defendant has not paid the plaintiff the half yearly dividends on the shares of which the plaintiff became the purchaser and the bearer, nor repaid the plaintiff the sum of 12s. 6d. on each of the said shares. We must therefore see whether the count shews a promise by the defendant to the plaintiff so to do, and a good consideration for the promise. There is no express allegation of any such promise; nor do we think there is an allegation of any facts from which such a promise is to be implied. The count alleges that the defendant, being "one of the

(a) 9 Com. B. 297.

(b) 4 M. & W. 338.

(c) 10 M. & W. 109.

original promoters and a managing director of the said Company," "in offering the twelve thousand shares to the public," had "guaranteed and promised to the bearers of the said twelve thousand shares at 12*s.* 6*d.* per share a minimum annual dividend of 33 per cent., payable in half yearly dividends" "upon each of such shares; and that the said guarantie and promise should remain in force until the said 12*s.* 6*d.* per share should be thus repaid to such bearers of the said twelve thousand shares;" and that the plaintiff afterwards "became and was the purchaser and bearer of two thousand five hundred of the said twelve thousand shares, at 12*s.* 6*d.* each, and took the same upon the faith of the said guarantie and promise." But this is laid as a promise "to the bearers of the said twelve thousand shares at 12*s.* 6*d.* per share," not to all persons who might thereafter under any circumstances become purchasers of the shares at 12*s.* 6*d.* a share from any other persons. The count does not even say that the shares were transferable. We were called upon to assume that such was the nature of the shares, according to the constitution of the Company, because the Company is stated to be "upon a certain principle known as a *Société Anonyme*:" but we cannot take judicial notice that the term has any such meaning.

There likewise seems to us, as between these parties, to be an entire want of consideration for the promise. It is not stated, nor does it appear, that, from the plaintiff's buying and becoming bearer of these shares, any benefit accrued to the defendant, or that, at the time when the contract is supposed to have been entered into, any prejudice accrued to the plaintiff. A prejudice to the promisee, incurred at the request of the

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promisor, may be a consideration, as well as a benefit to the promisor proceeding from the promisee: but this must be a prejudice on entering into the contract, not a prejudice from the breach of it.

An attempt was made to liken this case to *Williams v. Carwardine* (a) and the class of cases in which it has been held that an action may be maintained for a reward offered in a public advertisement: but in these cases there is a distinct promise to any one who shall make the discovery; and there is a good consideration for the promise in the benefit to accrue to the promisor, as in shewing that he is heir at law to a person who died seised of real property and intestate, or prejudice to the promisee, as that he shall entitle himself to the reward by voluntarily coming forward as a witness. Those cases, although not now to be questioned, are somewhat anomalous; and the party who makes the discovery might perhaps have been permitted to sue for work and labour done and performed at the request of the defendant, the sum stated in the advertisement being used as evidence of what ought to be recovered on a quantum meruit. But here there is nothing to shew any request by the defendant to the plaintiff: no privity is established between them; and there is neither promise nor consideration to establish a valid contract.

On the second count, however, we are of opinion that the plaintiff is entitled to our judgment. This count is founded on a deceitful representation, not on contract. Now we consider it clear law, that, if *A.* fraudulently makes a representation which is false, and which he knows to be false, to *B.*, meaning that *B.* shall

(a) 4 B. & Ad. 621.

act upon it, and *B.*, believing it to be true, does act upon it, and thereby suffers a damage, *B.* may maintain an action on the case against *A.* for the deceit; there being here the conjunction of wrong and loss entitling the injured and suffering party to a compensation in damages; *Com. Dig. Action upon the Case for a Deceit*, (A 9.), (A 10.).

Had it been alleged in the second count that the defendant, meaning to deceive and injure the plaintiff, and to induce him to purchase shares in the Company under the belief that it was a safe and profitable undertaking, fraudulently delivered to the plaintiff the prospectus containing the false representation, which the defendant then knew to be false, whereby the plaintiff was induced to purchase the shares at 12*s.* 6*d.* each, which were then of no value whatever, and thereby lost the price he paid for them, there can be no doubt that the count would have been sufficient. The allegations which it does contain appear to us to be equivalent. After stating the formation of the Company, and that twelve thousand shares were to be appropriated and offered to the public at 12*s.* 6*d.* a share, it alleges that the defendant, "intending to defraud, deceive and injure the public, and to cause it to be publicly represented and advertised that the said Company was likely to be a safe and profitable undertaking, and also to deceive the public who might become purchasers of the said twelve thousand shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully caused and procured it to be publicly advertised and made known, in and by a certain prospectus" &c. If the plaintiff had only further averred that afterwards, having seen the prospectus, he was induced to purchase

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the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff from which the loss arose: but the second count goes on expressly to aver "that the defendant, by means of the said false, fraudulent and deceitful pretences and representations," "wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and bearer, of two thousand five hundred of the said twelve thousand shares, at 12*s.* 6*d.* per share" &c.; and alleges the loss sustained to have been the direct consequence of the defendant's act. Thus the wrong and the loss are clearly concatenated as cause and effect.

The defendant's counsel argued that the second count did not contain any sufficient allegation of a false pretence. But we conceive the purport of the second count respecting the guarantie to be, that the defendant, knowing this Company to be a bubble company, and that no dividend would ever be paid upon the shares, fraudulently pretended to guarantee to the bearers of shares a minimum annual dividend of 33 per cent., to induce persons to purchase the shares from the Company, of which he was a promoter and director: "whereas, in truth and in fact, at the time of the making the said statement, the same was false and fraudulent, to the knowledge of the defendant; and the defendant had no ground whatever for offering such guarantie" &c. If the pretence was supposed to be merely that a guarantie had been given, still the count alleges that the pretence was false and fraudulent to the knowledge of the defendant, and that the defendant thereby fraudulently induced the plaintiff to purchase

the shares, whereby the loss has accrued. This construction of the allegation would only vary the evidence by which it is to be established.

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It was strongly urged, against the sufficiency of the second count, that no privity was shewn to exist between the parties, and that such privity was necessary, as the action did not arise from any public wrong or the neglect of any public duty. But in *Levy v. Langridge* (a), *Winterbottom v. Wright* (b), and the other cases referred to on this head, the alleged cause of action arose in respect of contracts or from negligence imputed to the defendant, whereby the plaintiff was damnified: and the doctrine there laid down cannot apply to an action founded, irrespectively of contract, upon a false representation fraudulently made by the defendant to the plaintiff for the purpose of inducing the plaintiff to act upon it, the plaintiff shewing that by so acting upon it he had suffered damage. Under such circumstances, although the parties be entire strangers to each other, the action lies: and it would be strange if a man who has so suffered damage from the wrongful act of another were without remedy.

Upon the whole, we think that there ought to be judgment for the defendant on the first count and for the plaintiff on the second.

Judgment accordingly.

(a) 4 M. & W. 338.

(b) 10 M. & W. 109.

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Saturday,
June 4th.

ARCHIBALD CAMPBELL TAIT, appellant, *against*
The Local Board of Health of the City of
CARLISLE, respondents.

The proviso, in sect. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63., that, if any kind of property before the passing of the Act has been exempt from rating by any Local Act, in respect of purposes for which district rates may be levied under the Public Health Act, 1848, the same kind of property, in respect of the same purposes, and to the same extent, shall be exempt from district rates under the last mentioned Act), applies only to exemptions in respect of the nature of the property.

Not, therefore, to property

exempt, under a local Act, in respect merely of its locality. Although the property, so locally situate, was exempt from poor rate.

A SPECIAL case was stated, under stat. 12 & 13 Vict. c. 45. s. 11., for the opinion of this Court, which was substantially as follows. By stat. 44 G. 3. c. lviii. (local and personal public), "for lighting the streets, lanes, and other public passages and places, within the city of *Carlisle*, in the county of *Cumberland*, and the suburbs of the said city; for paving the foot-paths of the streets of the said city and suburbs; and for otherwise improving the said city" (and which act is hereinafter called "The *Carlisle* Lighting and Paving Act"), The Mayor, Recorder and Aldermen of the City of *Carlisle*, the Dean and Chapter of *Carlisle*, and certain other persons therein named, and their successors (to be elected as in the said Act mentioned), were appointed Commissioners for putting the said Act in execution.

By section 33 of the said Act it was enacted that the Commissioners should yearly appoint two or more inhabitants or residents within the said city of *Carlisle*, or the suburbs thereof, to be assessors and collectors within the said city and suburbs, in order to raise money for the purposes of the Act.

By sect. 35 it was enacted that the said assessors should be, and they were thereby, empowered and required, respectively, to make and settle an equal yearly, half yearly or quarterly pound rate or rates, assessment or assessments, as by the said Commissioners should be ordered and directed, upon all and every occupier or occupiers of any messuage, dwelling house or buildings, or any messuages, dwelling houses or buildings, gardens, or other hereditaments, situate within the said city or suburbs; such rate or rates, assessment or assessments, not to exceed in the whole in any one year one shilling in the pound on the improved yearly value of the said messuages, &c.: such yearly value to be from time to time settled according to the respective value at which such messuages, &c. should be respectively rated for the relief of the poor, except in respect of the messuages, dwelling houses or buildings, gardens, or other hereditaments, situate within the Abbey of the said city, or the precincts thereof; and which messuages, dwelling houses or buildings, gardens or other hereditaments, so situate, should be rated and assessed equally with messuages, dwelling houses or buildings, gardens, or other hereditaments, situate in other parts of the said city or suburbs.

By sect. 42 it was enacted that no person should be rated on account of any gardens, garden grounds or orchard within the said city of *Carlisle*, or the suburbs thereof, during the time they should be occupied for the purpose only of selling the fruit and produce thereof, or for or on account of any arable meadow or pasture ground held or occupied within the said city of *Carlisle*, or the suburbs thereof; nor should any person be rateable by virtue of the said Act for or in respect of any stock in trade, money or personal estate, or for or in

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respect of any public building or buildings, or places for religious worship, any thing in that Act contained to the contrary notwithstanding.

By sect. 49 it was enacted that all moneys arising by the rates and assessments by that Act thereinbefore directed to be made and levied, should be applied to and for the defraying of the expenses of purchasing and setting up a sufficient number of lamps for lighting the said streets and lanes, and other public passages and places within the said city, and the suburbs thereof, and of repairing and maintaining the lamps so to be erected and set up by virtue of that Act, and for lighting and supplying the same with all proper materials, and for the other purposes in that Act mentioned and expressed.

By sect. 55 it was enacted that the Commissioners should and might, from time to time, and at all times after the passing of that Act, direct and order the present or future pavements of the foot-paths of such of the streets and lanes within the said city of *Carlisle*, and the suburbs thereof, except the foot-paths within the Abbey of the said city and the precincts thereof, as the said Commissioners, at any meeting or meetings to be called for that purpose, should think proper, to be taken up: and the said foot-paths to be raised, lowered, altered and repaired, or new paved, or to be laid with flag or broad paving stones, as to them should seem fit.

By sect. 62 it was enacted that nothing in the said Act contained should authorize the said Commissioners, or their successors, to exercise any of the powers vested in them by the said Act within the Abbey of the said city and precincts of the said Abbey otherwise than was thereafter directed, or to make or levy any rate or rates upon the Dean and Chapter of the Cathedral

Church of the said city, or their successors, for or in respect of messuages or tenements situate and being in the Abbey of the said city or the precincts thereof: but that the Dean and Chapter, and their successors, should be Commissioners for executing the several clauses, powers and matters therein contained, in respect to the Abbey of the said city, and the messuages and hereditaments situate therein, or within the precincts thereof, in case the Dean and Chapter should think proper to execute the same.

By sect. 63 it was enacted that, in case the Dean and Chapter should neglect or refuse to execute all or any of the powers, clauses or matters therein contained, for the space of fourteen days next after a notice in writing, the Commissioners thereinbefore appointed for the purpose of executing the general powers of the said Act should make complaint of such neglect or refusal to the justices of the peace at any general or quarter session of the peace for the county of *Cumberland*; and the said justices, at such session, should hear and determine the matter of such complaint: and, if they should judge the said complaint to be reasonable, should award such sum of money or penalty against the Dean and Chapter as to the said justices should seem reasonable and sufficient to enforce the due execution of all or any of the clauses and powers directed to be carried into execution by the Dean and Chapter.

By sect. 64 the Commissioners had power to contract for lamps, to fix and set up in the said city and suburbs.

By sect. 66 the property in such lamps was vested in the Commissioners.

After the passing of stat. 5 & 6 *W. 4. c. 76.*, all the powers vested by the said *Carlisle* Lighting and Paving

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Act in the above mentioned Commissioners for executing the provisions of the last mentioned Act were, in the year 1839, under sect. 75 of stat. 5 & 6 W. 4. c. 76., duly transferred to the body corporate of the city of *Carlisle*. And, at a meeting of the council of the said city, held on 9th *July* 1839, the following order was made.

“Ordered: that, in pursuance of the 87th section of the Municipal Corporation Act, such parts of this borough as are not now within the provisions of the Lighting and Paving Act for the City of *Carlisle*, and the suburbs thereof, shall, from and after the 10th day of *July* instant, be taken to be within the provisions of the said Act, so far as relates to the lighting of such parts of the borough, and to any rates by the said Act authorized to be raised for the purpose of lighting.”

After the passing of the Public Health Act, 1848 (*a*), and the Public Health Supplemental Act, 1849 (*b*), a Provisional Order of the General Board of Health for the application of the Public Health Act, 1848 (*a*), to the said city of *Carlisle* was made by the said Board, and was subsequently confirmed and made absolute by the Public Health Supplemental Act, 1850 (No. 3.) (*c*).

The said Provisional Order recited, as the fact was and is, that, upon the petition of not less than one tenth of the inhabitants rated to the relief of the poor of and within the city of *Carlisle* and within the boundaries of the said city as fixed for the purposes of the Municipal Corporation Act (the number of such petitioners exceeding thirty), the General Board of Health, appointed for the purposes of the Public Health Act, 1848 (*a*), had directed a superintending inspector to visit the said city, so bounded as aforesaid; who had accordingly visited

(*a*) 11 & 12 *Vict. c. 63.*

(*b*) 12 & 13 *Vict. c. 94.*

(*c*) 13 & 14 *Vict. c. 108.*

the same, and reported to the said Board upon the matters as in the said Provisional Order mentioned.

And such provisional order did then proceed to provide :

1. That, from and after the passing of any Act of Parliament confirming that Order, the Public Health Act, 1848, and every part thereof, except the 50th section, should apply to, and be in force within and throughout, the entire area, places and parts of places comprised within the boundaries of the said city of *Carlisle*, as the same were fixed for the purposes of the said Act for the regulation of Municipal Corporations in *England* and *Wales*: and that the said city and places, and parts of places, should be and constitute one district for the purposes of the said Public Health Act.

2. That the Mayor, Aldermen and Citizens of the said city of *Carlisle* should be, by the council of the said city, within and for the said district constituted as aforesaid, the Local Board of Health under that Act.

3. That the whole of the hereinbefore mentioned local Act, called The *Carlisle* Lighting and Paving Act, except the sections numbered 64 and 65 (which said sections empower the Commissioners to contract for a sufficient number of lamps, and for lighting the same, and also impose penalties on persons damaging the lamps), should be repealed.

4. That, from and after the passing of any Act of Parliament confirming that Order, all the powers, authorities and duties of the Commissioners for the time being constituted and appointed for putting the said local Act into execution, and of their treasurers, clerks, assessors, collectors, receivers, surveyors and other officers and persons, should wholly cease and determine.

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5. That such of the said powers, authorities and duties as were granted or imposed by so much of the said local Act as should not be repealed, according to the provisions of the said Order, and so far as the same were not repugnant to or inconsistent with the said Public Health Act, or the said Order, should be transferred to and be had and exercised by the said Local Board of Health, and in the same manner, as nearly as might be, as if such powers, authorities, privileges and duties had been granted or imposed by the said Public Health Act.

6. That the Local Board should be the Commissioners for executing such parts of the said local Act as should not be repealed according to the provisions of the said Order.

On 28th *October* 1851, the appellant was the occupier of a dwelling house, situate within the Abbey of the city or *Carlisle*, and within the district of the *Carlisle* Local Board of Health; and, as such occupier of the said dwelling house, was rated by the said Local Board in a general district rate made on the day and year last above mentioned, under and in pursuance of the provisions of the above mentioned statutes and orders, for the purpose of defraying the expenses of lighting the said district. The said Abbey or Cathedral precinct is a plot of ground in the city of *Carlisle*, of about five acres in extent, and is wholly situate within the ancient limits of the said city. It contains within its limits the Cathedral Church of *Carlisle*, the chapter house and Cathedral library, and several dwelling houses, namely, the Deanery and the residence houses of the canons, with gardens attached to such houses, and gardens being severally in the occupation of the individual members of the Chapter of the said church. It

also contains a porter's lodge, and offices in the occupation of the Dean and Chapter; a school house, which is in the occupation of the master of the *Carlisle* Grammar School, who is an officer of the Chapter; a dwelling house and premises, usually let to a tenant from year to year; a yard and stables, held by a lessee of the said Dean and Chapter; and three houses recently erected as residence houses for the incumbents of the parish of *St. Mary Carlisle*, and the district churches of *Christchurch* and *Trinity Church* in the said city, and now in the respective occupations of the present incumbents of the said parish and churches. The said district of the Abbey is also surrounded by a wall, with gates that are closed at night, and at the will and pleasure of the Dean and Chapter. No right of public way, either for horses, carriages or pedestrians, exists over any part of the same precinct: and the freehold of the same is vested in the said Dean and Chapter and their successors.

The question for the opinion of this Court is, Whether the said dwelling house, situate and being within the said Abbey, was liable to be assessed to the said rate for defraying the expenses of lighting the said district.

If the Court shall be of opinion that the said dwelling house was liable to be assessed to the said rate as aforesaid, the said general district rate is to be confirmed. But, if the Court shall be of opinion that the said dwelling house was not liable to be assessed as aforesaid, then the said general district rate is to be amended by striking out the assessment on the appellant. And the appellant and respondents agree that a judgment in conformity with the decision of this Court, and for such costs as this Court shall adjudge, may be entered on motion by either party at the General Quarter Sessions

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T. P. E. Thompson, for the respondents. The property was rateable. The question arises upon the third proviso in sect. 88 of The Public Health Act, 1848 (11 & 12 Vict. c. 63.), which, after provision made for the rating of such property as already is assessable to the relief of the poor, enacts: "That if within any district or part of a district any kind of property shall before the passing of this Act have been exempted from rating by any local Act, in respect of all or any of the purposes for which general or special rates may be made under this Act, the same kind of property shall, in respect of the same purposes, and to the same extent within the parts to which the exemption applies, but not further or otherwise, be exempt from assessment to any general or special district rates under this Act." The appellants will contend that by sects. 35 and 62 of the local Act, 44 G. 3. c. lviii., the property within the Abbey was exempt from rates for lighting the district; and that, consequently, such property is within the proviso of sect. 88 of The Public Health Act, 1848. But, first, the proviso applies, not to property which has been exempted as lying within certain districts, but to property which is of some particular nature, and exempted from rate in that character. This was the view taken by this Court in *Guardians of Chelmsford Union v. Chelmsford Local Board of Health (a)*. Now the ex-

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May 4th,
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(a) The Guardians of the CHELMSFORD UNION v. The Local Board of Health for CHELMSFORD.

THIS was an action of replevin, in which, by consent of parties, a special case was stated for the opinion of this Court. It appeared that in 1789 an Act of Parliament passed, 29 G. 3. c. 44. (not printed at length in

emption, if it be one, in stat. 44 G. 3. c. lviii. is of all property within a particular district, not of a particular

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the Statutes at Large), "for paving the footways of the several streets, publick passages, and places, within the town of *Chelmsford*, and hamlet of *Moulsham*, in the parish of *Chelmsford*, in the County of *Essex*; and for cleansing, lighting, and watching the said town and hamlet; and for removing and preventing nuisances, annoyances, and incroachments therein." Sect. 11 gave Commissioners, appointed by the Act, power to pave footways within certain limits, and to cause the several streets and other public passages and places within the town of *Chelmsford* and hamlet of *Moulsham* to be lighted, watched and cleansed. Sect. 24 of that Act empowered the Commissioners to lay rates upon the "tenants or occupiers of all houses, buildings, gardens, tenements, and other hereditaments and estates which lie within the said town and hamlet," towards answering and defraying the charges and expenses of carrying the purposes of the Act into execution. Sect. 28 contained the following proviso: "Provided also, That no person shall be subject to the payment of any rate or assessment by virtue of this Act, for or in respect of any lands, hop grounds, or garden grounds, other than such gardens as are adjoining to, and let or occupied with any messuage or tenement within the said town or hamlet subject or liable to be rated by this Act, or of any tithes, or any moduses or other payments in lieu of tithes; and that no person shall be subject to the payment of any rate or assessment by virtue of this Act for or in respect of any houses, buildings, gardens, tenements, or other hereditaments or estates within the said parish of *Chelmsford*, situate in" &c., "or at a greater distance from the parish church of *Chelmsford* aforesaid than" &c. (stating certain limits, which did not, however, in their terms appear, nor were stated in the case, to be identical with those in sect. 11.). Another act was also referred to in the case, 3 G. 4. c. liz. (local and personal, public), "for altering and enlarging the powers of an Act" &c. (the Act before mentioned): but no stress was laid upon this later Act in the argument or judgment. In 1850, upon petition of the inhabitants of *Chelmsford*, a Provisional Order was made, directing that, from and after the passing of any Act confirming the order, The Public Health Act, 1848 (except sect. 50), should apply and be in force throughout the entire area comprised within the boundaries of the parish of *Chelmsford*; that the local Acts (with exceptions not here material) should be repealed, and that the powers and duties of the Commissioners, so far as not inconsistent with The Public Health Act, 1848, or any by-law to be made thereunder, or that Order, should be transferred to the Local Board of Health. The Provisional Order was confirmed by The Public Health Supplemental Act, 1850 (13 & 14 Vict. c. 32). Afterwards,

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Saturday,
June 4th.

ARCHIBALD CAMPBELL TAIT, appellant, *against*
The Local Board of Health of the City of
CARLISLE, respondents.

The proviso, in sect. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63., that, if any kind of property before the passing of the Act has been exempt from rating by any Local Act, in respect of purposes for which district rates may be levied under the Public Health Act, 1848, the same kind of property, in respect of the same purposes, and to the same extent, shall be exempt from district rates under the last mentioned Act), applies only to exemptions in respect of the nature of the property. Not, therefore, to property exempt, under a local Act, in respect merely of its locality. Although the property, so locally situate, was exempt from poor rate.

A SPECIAL case was stated, under stat. 12 & 13 Vict. c. 45. s. 11., for the opinion of this Court, which was substantially as follows. By stat. 44 G. 3. c. lviii. (local and personal public), "for lighting the streets, lanes, and other public passages and places, within the city of *Carlisle*, in the county of *Cumberland*, and the suburbs of the said city; for paving the foot-paths of the streets of the said city and suburbs; and for otherwise improving the said city" (and which act is hereinafter called "The *Carlisle* Lighting and Paving Act"), The Mayor, Recorder and Aldermen of the City of *Carlisle*, the Dean and Chapter of *Carlisle*, and certain other persons therein named, and their successors (to be elected as in the said Act mentioned), were appointed Commissioners for putting the said Act in execution.

By section 33 of the said Act it was enacted that the Commissioners should yearly appoint two or more inhabitants or residents within the said city of *Carlisle*, or the suburbs thereof, to be assessors and collectors within the said city and suburbs, in order to raise money for the purposes of the Act.

By sect. 35 it was enacted that the said assessors should be, and they were thereby, empowered and required, respectively, to make and settle an equal yearly, half yearly or quarterly pound rate or rates, assessment or assessments, as by the said Commissioners should be ordered and directed, upon all and every occupier or occupiers of any messuage, dwelling house or buildings, or any messuages, dwelling houses or buildings, gardens, or other hereditaments, situate within the said city or suburbs; such rate or rates, assessment or assessments, not to exceed in the whole in any one year one shilling in the pound on the improved yearly value of the said messuages, &c.: such yearly value to be from time to time settled according to the respective value at which such messuages, &c. should be respectively rated for the relief of the poor, except in respect of the messuages, dwelling houses or buildings, gardens, or other hereditaments, situate within the Abbey of the said city, or the precincts thereof; and which messuages, dwelling houses or buildings, gardens or other hereditaments, so situate, should be rated and assessed equally with messuages, dwelling houses or buildings, gardens, or other hereditaments, situate in other parts of the said city or suburbs.

By sect. 42 it was enacted that no person should be rated on account of any gardens, garden grounds or orchard within the said city of *Carlisle*, or the suburbs thereof, during the time they should be occupied for the purpose only of selling the fruit and produce thereof, or for or on account of any arable meadow or pasture ground held or occupied within the said city of *Carlisle*, or the suburbs thereof; nor should any person be rateable by virtue of the said Act for or in respect of any stock in trade, money or personal estate, or for or in

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of locality was contemplated by the Act is manifest from the earlier part of the same sect. 88; for the enactment for rating on the value ascertained by the poor rate is followed by a proviso for rating any district where there is no poor rate upon an estimate of the net annual value, which would place such district in the same condition with property rated to the poor. There is no general exemption of "property" not previously liable, as in the Highway Act, 5 & 6 W. 4. c. 50. s. 33. "A party who claims to be exempted from this general imposition" (the highway rate), "is bound clearly to establish such exemption;" per *Wilde C. J.* in *Richardson v. Tubbs* (a).

CROMPTON J. The only question is, Whether the proviso in sect. 88 of The Public Health Act, 1848, applies to exemptions referring exclusively to locality. Mr. *Badeley* has to shew that "any kind of property" means property of all kinds lying without a defined limit. I think that would be a strained construction: the words cannot mean all property of whatever kind lying without. When we look back at sect. 28 of stat. 29 G. 3. c. 41., we find kinds of property, such as tithes, exempted from the rate: and this is the species of exemption to which the proviso in question refers. The only doubt I had was suggested by the words "within the parts to which the exemption applies:" but this, I think, means the property of the specified kind within the particular district. I am therefore of opinion that the workhouse is not within the proviso.

(No other Judge was present.)

Judgment for defendants.

(a) 4 Com. B. 304. 313. *Thompson* referred also, as an illustration of the effect of general words, in an Act, in putting an end to previous exemptions from rate, to the statutes discussed in a case of *Plant and another*, appellants, v. *The Mayor, &c. of Manchester*, respondents, which was determined in this Court on *Saturday, January 15th 1853*. A case had been stated for the opinion of this Court under stat. 12 & 13 Vict. c. 45. s. 11. The question turned upon the effect of The *Manchester* General Improvement Act, 1851 (14 & 15 Vict. c. cxix., local and personal, public.) Sect. 96 enacts: That the Mayor, Aldermen, and Burgesses of the borough of *Manchester* "shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the borough, and shall be

But, secondly, stat. 44 G. 3. c. lviii. does not in fact give any exemption applicable to the property in question. Sect. 42 does exempt particular kinds of property.

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liable to be indicted for such misdemeanour, in the same manner as the inhabitants thereof or of any township therein would have been liable if this Act had not been passed. Sect. 97 empowers the Council of the borough of *Manchester*, "for the purpose of maintaining and repairing the highways within the borough," "to make and levy a rate or assessment, to be called the 'highway rate,' on the occupiers of all such kinds of property as by the laws in force for the time being might be assessed to any highway rate within the township in which the highways to be maintained and repaired are situate." The township of *Beswick* was within the borough; but it had never previously contributed to any highway rate, and was extra-parochial: and the following Acts were referred to in the case: 59 G. 3. c. xxii., local and personal, public, "for providing that the several highways within the parish of *Manchester*, in the County Palatine of *Lancaster*, shall be repaired by the inhabitants of the respective townships within which the same are situate;" 6 G. 4. c. li., local and personal, public, "for making and maintaining a road from *Great Ancoats Street* in the town of *Manchester*, in the County of *Lancaster*, to join a diversion of the *Manchester and Salter's Brook Road* in *Andershaw*, in the parish of *Ashton-under-Lyne*, in the said county, and two branches of road communicating therewith;" 14 & 15 Vict. c. xli., local and personal, public, "to continue the term of the Act of the Sixth year of George the Fourth, chapter fifty one (local), so far as relates to the turnpike road between *Manchester* and *Andershaw* in the parish of *Ashton-under-Lyne*, all in the County Palatine of *Lancaster*; and to make better provision for the repair of the road; and for other purposes." The question was, Whether property within the township of *Beswick* was liable to the highway rate.

Hugh Hill, for the respondents, referred to *Regina v. Lordsmere* (15 Q. B. 689.), and *Rex v. Kingsmoor* (2 B. & C. 190.); but he contended that, assuming the effect of the previous Acts to be that the township of *Beswick* was not liable to repair the roads within it, still sect. 97 of the *Manchester Improvement Act*, 1851. was conclusive.

Pashley appeared for the appellants; but, upon being asked by the Court (Lord Campbell C. J., Coleridge, Wightman and Crompton Js.) whether the last mentioned Act was not conclusive, he admitted that the objection to the liability could not be sustained.

Judgment for respondents.

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Sect. 35 enables the then Commissioners to rate the property in the city, except the Abbey, and, as to that, directs that it shall be rated equally with the other property. Sect. 62 enacts that the Commissioners shall not exercise any power, except as directed by the Act, within the precincts of the Abbey; but that, as to these precincts, the Dean and Chapter shall be Commissioners, if they think fit to exercise such power. The provisions relate merely to the persons who are to execute the powers.

Pearson, contra. First, this property was exempt from rating under stat. 44 G. 3. c. lviii. Under sect. 35, the substantive rating clause, the property within the Abbey is expressly excepted. Sect. 62 also expressly provides that the Commissioners shall have no power to rate the property within the precincts: though, if the Dean and Chapter think fit, they themselves may set the Act in motion within the precincts, acting as Commissioners themselves, and in that case rating, as directed in sect. 35, the precinct equally with the rest of the city. By sect. 49 the moneys raised by the rates will be applied to lighting the streets, lanes, and other public passages and places of the city; but the precincts of the Abbey will not share in this unless the Dean and Chapter choose to adopt the Act. And they in fact are not likely to derive benefit from the Act: the property, occupied to a great extent by private gardens, will not require lighting. So, as to the footpaths in sect. 55, the precincts are expressly taken out of the enactment. Secondly, The Public Health Act, 1848, does not apply to such a case. The Act, by sect. 8, can be applied to any city &c. only upon the petition of

not less than one tenth of the inhabitants rated to the relief of the poor: the inhabitants of the precinct would thus have no voice in adopting or refusing to adopt the provisions. [*Thompson* pointed out that the case did not state that the occupiers of the precinct were not rated to the poor, though this might be probable, from the ordinary usage elsewhere.] If that is denied, the Court will send back the case to be restated as to this fact, unless the fact be held unimportant. The Public Health Act, 1848, should be read as if the Provisional Order, and the confirming statute, were incorporated with it. Then the effect of the Provisional Order, so incorporated in sect. 88, will be that the whole of the area within the city, saving the exempted part, shall be that within which the Act shall be in force. It is said that the words "any kind of property" are inapplicable to property exempted generally by reason of its situation: but surely one kind of property is that which, in respect of its locality, has peculiar qualities. [*Crompton J.* At the beginning of sect. 88 the rate is directed to be made upon the occupier "of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor:" can that refer to a kind of property assessable or not merely in respect of locality?] To qualify the exemption in the later part of the section by an inference thus drawn from a distinct and separate part of the section would be equivalent to repealing an affirmative statute by implication from another affirmative statute, which cannot be done; a principle which is illustrated by *Foster's Case* (a), *Goldson v. Buck* (b), *Rex v. Idle* (c),

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(a) 11 *Rep.* 56 b. 62 b.(b) 15 *East*, 372.(c) 2 *B. & Ald.* 149.

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Regina v. St. Leonard's, Shoreditch (a), *Usher v. Walters* (b), *Pilkington v. Cooke* (c), *Wrightup v. Greenacre* (d). In *Regina v. St. George, Southwark* (e), words of a statute expressly empowering to rate all inhabitants and occupiers of houses were held to be controlled by an exemption recognised, though not expressly given, in another part of the same statute.

T. P. E. Thompson, in reply. Sect. 8 of The Public Health Improvement Act, 1848, cannot be construed as excluding from the application of the Act all districts the inhabitants of which are not rated to the poor. It merely makes the assent of a certain portion of rated inhabitants a test of the fact that the place may generally be benefitted by the adoption of the Act: and the petition is followed, not by the immediate application of the Act, but by the appointment of an inspector. Whatever class of inhabitants were fixed upon for this purpose, some anomaly like that suggested on the other side would arise. (He was then stopped by the Court.)

ERLE J. (g). The question is, Whether a rate can be laid by the Local Board of Health on a house which is within the area of the city and also within the precinct of the Abbey. Mr. *Pearson* contends that the Provisional Order could not take effect within the precinct because the inhabitants are not rated to the relief of the poor, and the jurisdiction of the Board of Health cannot come

(a) 13 Q. B. 964.

(b) 4 Q. B. 553.

(c) 16 M. & W. 615.

(d) 10 Q. B. 1.

(e) 10 Q. B. 852.

(g) Lord Campbell C. J. and Coleridge J. were absent.

into existence without the petition of one tenth of the inhabitants who are so rated. But I think it is not essential to the jurisdiction that the inhabitants of the particular spot should be rateable to the poor. What Parliament has required is the petition of one tenth of the inhabitants rated to the poor within the whole boundary: if there be such a petition, all the inhabitants, rated to the poor or not, are brought within the 8th section of The Public Health Act, 1848. Such a petition was made: and the Provisional Order puts the Act into operation over the whole area of the city. There can therefore, according to ordinary understanding, be no doubt that the Local Board of Health may act within the precinct. Then, the general power to rate being given to this extent, the main point for the appellant is that the property within the precinct falls within the exemption in the third proviso of sect. 88, inasmuch as property so situated is exempt from rate by stat. 44 G. 3. c. lviii. Now, assuming that such an exemption is created by the statute last mentioned, the question propounded is, Whether the third proviso in sect. 88 of the Public Health Act, 1848, applies. I am of opinion that it does not; and that the proviso does not extend to property exempted in respect of its locality, but only to property exempted in respect of its kind. To make this distinction intelligible: in almost all local Acts for lighting and paving, certain kinds of property are selected for exemption, in consideration of the nature of the property which derives benefit from the Act: one kind of property may derive such benefit: another, such as arable and pasture land, may not, and is therefore exempted from the rate; and it was thought reasonable to perpetuate such an exemption. That I

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take to be the meaning of this clause. Now, so construing it, and assuming that all the property within the precinct is exempted under stat. 44 *G. 3. c. lviii.*, it is clear that the kind of property now in question is not to be exempted under sect. 88 of the Public Health Act, 1848: it is the very kind of property which ought to be rated. In the case which has been referred to (a) a construction was put upon this clause: and we held that no property, merely by virtue of its being previously exempted in respect of its locality, fell within the exemption in the proviso. That is an answer to the main point urged in favour of the appellant. As to the assumption itself, that the property so situate was exempt from rating under stat. 44 *G. 3. c. lviii.*, if it were necessary to consider it, I am by no means of opinion that it is a true assumption. Sect. 35 declares what is to be rated: and, under this, it is impossible to contend that the property is not to be rated at all; there is an affirmative enactment that it shall be rated equally with other hereditaments: but this, it is suggested, is inconsistent with section 62. I incline to think that this section meant only to give the Dean and Chapter the option of having, within the precinct, the sole authority of commissioners: and then to provide, by the words in sect. 35 which otherwise have no meaning, how the property within the precinct is to be rated, seemingly giving the Commissioners who act for the rest of the city power to act if the Dean and Chapter do not think proper to execute their powers. I incline to think that this is the effect. Sect. 63, it is true, appears to make it penal on the Dean and Chapter not to exercise their

(a) Ante, p. 500, note (a).

powers: but that, I think, may mean only the case where they have declared their intention to execute them, but afterwards neglect to do so. On the whole, I am of opinion that this rate is valid.

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CROMPTON J. I am of the same opinion. Mr. *Pearson* contends that an exemption is given by stat. 44 G. 3. c. lviii., and that this is not taken away by the Public Health Act, 1848. I think he failed on both points. If it were necessary to decide the first, I should be of opinion that stat. 44 G. 3. c. lviii. gave no such exemption. The 35th section expressly enacts that the property shall be rated equally with other property. That does not appear to me to be altered by sect. 62: the meaning may well be that the power is to be exercised by the Dean and Chapter, if they think proper, and that they shall carry this out by rating equally with the other property. But, whether this be so or not, I think Mr. *Pearson* did not make out the second point. He suggests that no benefit arose to the Dean and Chapter under stat. 44 G. 3. c. lviii., because they cannot place lamps in a place where the greater part of the space may be occupied by private gardens. But they are benefitted by the whole city being lighted, which facilitates the access to and from the precinct. The only point upon which I felt a doubt was as to sect. 8 of the Public Health Act, 1848. But we cannot hold that, where a small part of a city happens not to be rated to the poor, the benefit of the Act is not to be applied throughout the whole city. The main question turns on the proviso in sect. 88: and, as to that, the point has already been decided in the case which has been mentioned. There can be no doubt that "kind of property"

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refers to the sort of property, not to its locality: that is clearly the meaning of the words in the earlier part of the section; and the exempting proviso must use them in the same sense.

Judgment for respondents.

Monday,
June 6th.

THOMAS TURNER and JOHN TURNER *against*
THOMAS HENRY EVANS.

Action on an agreement, by which defendant, a wine merchant at *C.*, sold to plaintiffs his house and premises at *C.* and his stock in trade, and also sold the good will of his business, and in consideration thereof promised them not directly or indirectly to "set up, embark in, or carry on, the business or trade of a wine merchant at *C.*, or at any other town or place within the three counties of *C., A. or M.*" Breach: That he had done so. Issue thereon. On the trial, it was admitted that, after the agreement, defendant commenced business, as a wine merchant, at a town not within the prohibited district, and from thence in many instances supplied wine to persons resident within the district, in pursuance of orders solicited by him within the district: but he had no residence, warehouse or place of business within the district: and it was left to the Court, as a mixed question of law and fact, to say whether this was a breach. Held: that defendant might carry on business within the district, to such an extent as to be a breach of the contract, though he had neither place of business nor stores within the district. And held also, as a matter of fact, that he had supplied wine so systematically within the district, as to have made a business of it. And the verdict was entered for plaintiff.

COUNT reciting that defendant, before the making of the after mentioned agreement, carried on the business of a wine and spirit merchant at *Carnarvon*. And that, by an agreement between plaintiffs and defendant, in consideration that plaintiffs would purchase from defendant his house and premises at *Carnarvon* for 1400*l.*, and his stock in trade and household furniture there at a valuation, and would pay defendant 2000*l.* in the nature of and as a premium for the good will of the said business of a wine and spirit merchant then carried on by defendant, defendant promised that he should not, nor would, at any time or times thereafter, by himself, his partner or agent, or otherwise howsoever, either directly or indirectly, set up, embark in, or carry on, the business or trade of a wine or spirit

merchant at *Carnarvon*, or at any other town or place within the three counties of *Carnarvon*, *Anglesea* and *Merioneth*. Breach: That defendant did, by himself, his partner and agents, and otherwise, directly and indirectly, set up, embark in and carry on the trade and business of a wine and spirit merchant at *Carnarvon*, and in other towns and places within the counties of *Carnarvon*, *Anglesea* and *Merioneth*. Plea: A traverse of the breach in terms. Issue thereon.

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On the trial, before *Maule J.*, at the last *Carnarvon* Assizes, it appeared that the plaintiff *Thomas Turner* and his brother *Lewellyn Turner*, on 20th May 1845, entered into a written agreement to purchase the good will of the business of the defendant, who was then about to retire. The material part of the agreement was to the same effect as that set out in the count. On 2d June 1845, by agreement between the plaintiff *Thomas Turner*, *Lewellyn Turner*, the defendant and the plaintiff *John Turner*, some alterations, not material to the present case, were made in the terms of the purchase; and the plaintiff *John Turner* was substituted for *Lewellyn Turner*. The two plaintiffs paid the defendant the stipulated price, and carried on business in *Carnarvon* and the other counties as successors to the defendant, who removed from *Carnarvon*, and was not engaged anywhere in the wine or spirit trade till the year 1851, when he set up business as a wine and spirit merchant in *Chester*. The plaintiffs applied to *Kindersley V. C.* for an injunction to prohibit the defendant from carrying on the business of a wine or spirit merchant within the prohibited counties; alleging that he personally and by his agents solicited orders from old customers in those counties, and supplied them from his place of business

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at *Chester*. The Vice Chancellor, without expressing any opinion as to whether the facts alleged would or would not be a breach of the agreement, ordered that, on the defendant undertaking to keep accounts of his dealings within the counties, the motion should stand over till the plaintiffs brought an action. On appeal by the plaintiffs to the Lords Justices, their Lordships differed in opinion. Lord *Cranworth* was of opinion that the facts alleged were not a breach of the agreement. Lord Justice *Knight Bruce* was of opinion that they were a breach, and that there ought to be an injunction. The Lords Justices under these circumstances did not vary the Vice Chancellor's order. At the trial the facts were ultimately agreed upon. It was admitted by both sides that, since the execution of the agreement, the defendant had set up business as a wine and spirit merchant at *Chester*, and had in fifty instances supplied wine and spirits to persons resident in *Carnarvon*, and in other towns and places within *Carnarvon*, *Anglesea* and *Merioneth*, in pursuance of orders solicited by him personally and by his agents from those persons within *Carnarvon*, and the said other towns and places: and that defendant had no place of residence, warehouse, cellars or place of business within *Carnarvon* or the said other towns and places. On these admitted facts, the learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiffs with nominal damages.

Welsby, in the ensuing term, obtained a rule *Nisi* accordingly.

Bramwell, *McIntyre* and *V. Williams* now shewed cause. The whole question is, What is meant by

“setting up or carrying on the business of a wine or spirit merchant” at a place? There is no doubt that, if a person, not aware of the previous agreement with the plaintiffs, were asked the question, “Where did *Evans* set up his business in 1851?” he would answer “*Chester*.” If a man is to be considered as setting up his business wherever he solicits a customer, he sets up many businesses, not one. The fact, that the trade thus carried on at *Chester* is or may be injurious to the trade at *Carnarvon* purchased by the plaintiffs, should not affect the question. That might be a good reason why the plaintiffs should have stipulated that the defendant should not trade with persons in the counties; but it cannot alter the bargain, which is only that he should not carry on the trade there. Could it be said that, if a customer, resident at *Carnarvon*, came to *Chester* and gave an order to the defendant, the defendant was bound to refuse to supply? If not, how can it make a difference if the order is given at *Carnarvon*? [Crompton J. We must take it, on these admissions, that the wine and spirits were supplied in the ordinary way, the wine merchant delivering the wine at his customer’s abode. If so, in each of these cases, the contract for sale of the wine, and the delivery, both take place in *Carnarvon*. Is it not a question of degree whether those instances amount to carrying on trade there? If a wine merchant has his stores in *Dublin* and supplies many customers in *England*, which is a common case, is not he a trader in *England* within the bankrupt law?] Perhaps he is; for he trades: but the question here is, not whether he trades in *Carnarvon*, but whether he sets up or carries on the trade which was purchased by the plaintiffs. Licences must, by

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stat. 6 G. 4. c. 81. s. 7., specify the place at which the trade or business is to be carried on. The plaintiffs' licence would specify *Carnarvon*; the defendant's *Chester*. Lord Justice *Knight Bruce* seems to have been principally influenced by an impression that the defendant was defrauding the plaintiffs. But no such consideration should influence the construction of the agreement, which depends on the meaning of the words used.

Sir F. Thesiger, Welsby, E. Beavan and Coxon, in support of the rule. The question depends on the meaning of the words: but they are to be construed with reference to the transaction with respect to which they are used. Here the words are used in a contract, by which the defendant sells a business; and he promises not to set up or carry on that business in the counties of *Carnarvon, Anglesea or Merioneth*. He had no warehouses in *Anglesea or Merioneth*: and before the agreement he carried on business in those two counties from *Carnarvon*, precisely as he now does from *Chester*.

Lord CAMPBELL C. J. This case has been ably argued: but, after hearing all that has been urged by the defendant's counsel, I come to a conclusion favourable to the plaintiffs. The question was, at the trial, left to the Court as a mixed question of law and fact; which in truth it is. The question of law is, Whether there could be an infringement of the defendant's promise, it being admitted that the defendant had no place of residence, warehouse, cellars or place of business within the prohibited district. I am of opinion that without having any one of these the defendant might break the contract. In ascertaining what the meaning

of the contract is, I must look to the circumstances ; and the language used is to be understood with reference to those. I am not now to say what the phrase "carrying on business at a place" may mean in the Excise Acts, or in other contracts ; but to say what, in common sense, it means when used by one who sells the business of a wine merchant for a large sum of money and promises that he will not directly nor indirectly carry on that business within a specified district. It cannot then be supposed to mean that he may, after selling the good will of that business, do what he will within the district provided he has no cellars or stores within it. If so, the intention of the parties might be completely defeated. The intention was, that the plaintiffs who purchased the good will of the defendant's business should supply his customers. But, according to the defendant's construction, he might be in *Carnarvon* every day, solicit orders from every customer in the place, and supply them as before, except that the wine must be brought from a cellar outside the district ; and thus he might effectually defraud the plaintiffs of the business which they bought and paid for. I think, however, that it is not of the essence of the business of a wine merchant to have a warehouse, cellar or place of business at all : and, consequently, that there might, in point of law, be a breach of this contract by the defendant without his having any of those. Then, that being so, there comes the question of fact : and I am now substituted for a jurymen ; and I am to say whether what has taken place was a breach in fact. I look at the admissions in this case ; and I find that the defendant from his cellars in *Chester*, in fifty instances, supplied persons in *Carnarvon* and elsewhere within the three counties, in pursuance of orders solicited

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by him personally and by his agents within the district. Now what was the defendant's promise? That he would not "by himself, his partner or agent, or otherwise howsoever, either directly or indirectly set up, embark in, or carry on, the business or trade of a wine or spirit merchant at *Carnarvon*," or at any other town or place within the three counties named. On the admissions, I think he did *directly* carry on the business at and in *Carnarvon*; for I see no distinction here between the words "at" and "in." What has he done? He has, as a wine merchant, systematically solicited in *Carnarvon* orders from customers there, which he executed in *Carnarvon*. If he had had stores there to which he once for all brought his wine, and from thence delivered it to his customers, it is admitted that it would be a breach. Can it make any difference that, toties quoties, the wine is brought by the defendant's agents from *Chester*, and delivered to the customer from the defendant's cart at *Carnarvon*, instead of from his stores there? I am of opinion that, if this is done systematically, it is carrying on the business of a wine merchant. If done now and then, to oblige an old customer or the like, it would be no breach of the contract; for that would not be carrying on business: but here it was done on system.

ERLE J. (a). The defendant sold the good will of his business of a wine merchant at *Carnarvon* for 2000*l.*, and contracted with the purchasers not to carry on the business of a wine merchant at *Carnarvon*, or at any other place within *Carnarvon*, *Anglesea* or *Merioneth*: and he has, as a wine merchant, obtained and executed

(a) Coleridge J. was absent.

as many orders as he could get from customers within those counties: and we are called on to say if that is a breach of the contract. The defendant says it is not, for he has his counting house, clerks and cellars at *Chester*, not within the district. The language of all contracts must be construed with reference to the circumstances; and the intention is to be collected from the words as used with reference to these. Here the parties agree to buy and sell the good will of a business for a sum of money. The object was, that the purchasers might get the profits of that business. How are those profits earned, but by obtaining and executing orders for wine? I think clerks, warehouses, cellars, &c., are but appliances and incidents to the business. The business may be carried on without any of them, by a person who obtains and executes orders, and cannot be carried on unless orders are obtained: then, construing the contract here according to the intention, to be gathered from the words as used in such a transaction, I think there is a breach.

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CROMPTON J. Mr. *Bramwell* asks us to put the same sense on the words "carry on business at a place" that would be put on them by a person who does not know anything about the contract: and he says such a person would say that the defendant carried on his business at *Chester*, not at *Carnarvon*. But I do not think that is the way in which contracts are to be construed. We are to look at the whole instrument and the object of the parties, and see what is the intention to be collected from the whole of the language with reference to those. Here the object was to sell to the plaintiffs the connec-

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tion and good will of the defendant's business as a wine merchant; and for that object the defendant promises not directly or indirectly to carry on that business within the three counties. It seems to me he has done so, indirectly at all events, if not directly. The business of a wine merchant is to make a profit by selling and delivering wine. The defendant has, systematically, agents in the prohibited district soliciting and executing orders for wine. It is not material, I think, how he brings the wine to his customers, whether from stores within the district or without. The wine, whether delivered from stores or from a cart, is equally sold and delivered in the district. I do not see that it is at all necessary that he should have any wine within the district, if he is evading his contract. I think the question is one of fact: Was he doing this on system? For he would not be carrying on business if he did it only now and then: but on that point there is ample evidence to justify a verdict for the plaintiffs.

Rule absolute.

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In the matter of EDWARD BOYCE.

Tuesday,
June 7th.

A WRIT of habeas corpus ad subjiciendum issued, directed to the keeper of The Debtors' Prison for *London and Middlesex* in the City of *London*, commanding him to have the body of *Edward Boyce* before the Court, &c.

Thomas Burdon, the keeper, by his return, dated 6th *June* 1853, certified that *Boyce* "is detained in my custody by virtue of a certain warrant of commitment made and issued on the 22d day of *March* last past, under the seal of the county court of *Middlesex*, holden at *Brentford* Town Hall, and under the hand of the clerk of the said court. And that the said *Edward Boyce* was brought into my custody under and by virtue of such warrant on the 3d day of *May* last past; and which warrant is as follows." Then followed the numbers of the plaint, &c. "In the county court of *Middlesex*, holden at *Brentford* Town Hall: Between *Benjamin Clements*, plaintiff, and *Edward Boyce*, defendant: To the high bailiff and others the bailiffs of

To a habeas corpus ad subjiciendum, commanding the keeper of The Debtors' Prison in *London* to have the body of *B.* before the court, the keeper made a return that *B.* was detained in his custody by virtue of a warrant of the county court of *Middlesex*, for commitment of *B.* for forty days, after examination of *B.*, as a defendant against whom judgment had passed in the county court. The warrant was in the form given in the schedule to the rules of practice made under stat. 12 & 13

Vict. c. 101. s. 12. The return stated, in addition, that *B.* was brought into his custody on a previous day under a similar warrant of commitment, on the same judgment, for seven days: that *B.* remained in the keeper's custody for that term: that *B.* was afterwards brought into the keeper's custody, on another warrant, on the same judgment, for commitment, for forty days, and that *B.* remained in the keeper's custody for the term last mentioned. Both those terms had expired before the date of the summons recited in the warrant under which the prisoner was now detained.

Prisoner remanded, inasmuch as defendant was liable to be committed, upon the same judgment, for every fresh default, and the Court would intend each commitment to be for a fresh default, and it was not necessary that any one commitment should refer to any previous one.

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the said court, and all constables and peace officers within the jurisdiction of the said court, and to the governor (or keeper) of 'The Debtors' Prison, *Whitecross Street*, for *London* and *Middlesex* in the City of *London*. Whereas, at a court holden at the Town Hall, *New Brentford*, on the 17th day of *June* 1851, the above named plaintiff, by the judgment of the said court, in a certain suit wherein the said court had jurisdiction, recovered against the above named defendant the sum of 3*l.* 15*s.* for his debt, and the sum of 19*s.* 8*d.* the costs of the said suit, amounting together to the sum of 4*l.* 14*s.* 8*d.*: and thereupon it was then and there ordered by the said court that the defendant should pay the same to the clerk of the court at his office in the Town Hall, *New Brentford*, by two equal instalments of 2*l.* 7*s.* 4*d.* each, the first instalment to be paid upon the 30th day of *June* then instant, and the balance in four weeks afterwards: And whereas, the defendant not having paid the said sum pursuant to the said order, a summons was, upon the application of the plaintiff, duly issued from and out of the said court against the defendant, by which said summons the defendant was required to appear at the said county court of *Middlesex*, in the Town Hall, *New Brentford*, on the 22d day of *March* 1853, to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectation he then had, and as to the property and means he still had, of discharging the said debt, and as to the disposal he had made of any property: And whereas the defendant, having duly appeared

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at the said court pursuant to the said summons, was examined touching the above matters: And whereas it appeared, upon such examination, to the satisfaction of the judge of the said court, that he has had, since the said judgment against him, sufficient means and ability to pay the said debt and costs so recovered against him, and that he hath neglected to pay the same: And thereupon it was ordered by the said judge that the defendant should be committed for the term of forty days to The Debtors' Prison aforesaid in the City of *London*, according to the form of the statute in that case made and provided, or until he should be discharged by due course of law: These are therefore to require you, the said high bailiff, bailiffs and others, to take the defendant, and to deliver him to the governor (or keeper) of The Debtors' Prison aforesaid; and you the said governor (or keeper) are hereby required to receive the defendant, and him safely to keep in the said Debtors' Prison for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law. For which this shall be your sufficient warrant. Given under the seal of the court this 22d of *March* 1853. *Chas. Burrows*, clerk of the court. To *John Rogers Esq.*, high bailiff of the said court, and others the bailiffs thereof.' And I further certify that * the warrant herein set out by me is a true and correct copy of the warrant by virtue of which the said *Edward Boyce* is detained in my custody, and that he is not detained for any other cause whatsoever. Dated this 6th day of *June* 1853. *T. Burdon*, keeper of The Debtors' Prison above mentioned."

This return was afterwards, by order of this Court, amended by the addition of the following.

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“And, in obedience to the order of the Court of Queen’s Bench, I, the said *Thomas Burdon*, do hereby certify that *Edward Boyce* was brought into my custody on the 9th day *September* in the year 1851, under and by virtue of a warrant of commitment made and issued on the 19th day of *August* 1851, under the seal of the county court of *Middlesex*, holden” &c. “and under the hand of the clerk of the said court; and which warrant is as follows.” The last mentioned warrant was then set out, which recited the same judgment of the county court, as in the warrant first set out, a summons as before, to appear on 19th *August* 1851, an appearance on that day, and an order of commitment then made for seven days, or until &c. (as above). “And I certify that the said *Edward Boyce* remained in my custody for the term specified in the last recited warrant. And I further certify that *Edward Boyce* was brought into my custody on the 31st day of *May* 1852, by virtue of a warrant of commitment made and issued in like manner as afore-said; and which warrant is as follows.” This warrant was then set out, which recited the same judgment, a summons in the same form, to appear on 18th *May* 1852, an appearance on that day, and an order of commitment then made for forty days, or until &c. “And I certify that the said *Edward Boyce* remained in my custody for the term specified in the last recited warrant. Dated, this 7th day of *June* 1853.” Signed as before.

On the return being read:

G. Francis moved that the prisoner should be discharged. The last commitment (the one first mentioned) appears, by the rest of the return, to be illegal: and it is upon this commitment that the party is imprisoned.

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It must be supported, if at all, upon sect. 103 of stat. 9 & 10 *Vict. c. 95.*, which enacts: "That no imprisonment under this Act shall in any wise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned, and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same manner as if such imprisonment had not taken place." Now the liability to imprisonment under the Act, here referred to, arises upon sect. 99: that section authorizes the judge of the county court to commit for forty days, when the party fails to appear under the summons authorized in sect. 98, or does not answer satisfactorily, and in other cases, including that relied upon in the commitment: "if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, or as shall be ordered pursuant to the power hereinafter provided." Now the default upon which the first imprisonment was ordered must be considered to have been satisfied by that imprisonment. [Lord *Campbell* C. J. May there not be a new default? If, after the expiration of the first imprisonment, he had money enough to satisfy the debt, would not that amount to a new default? And is not that state of facts consistent with the return?] The case appears

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to be pointed at by sect. 100: but, under that section, the proper course would be for the judge to alter his previous order and make a further order for payment. [Lord *Campbell* C. J. The former order would be correct: why is it to be altered? *Coleridge* J. There may have been no alteration in the circumstances, except the repetition of the default: the same means of paying may have been in the debtor's hands from the first.] That would hardly satisfy the expression in sect. 103, "new fraud or other default." But the last commitment does not shew, with sufficient distinctness, that there has been a new default even in the sense suggested. "It is said in general, that upon the return of the habeas corpus the cause of the imprisonment ought to appear as specifically and certainly to the judges, before whom it is returned, as it did to the court or person authorized to commit;" 4 *Bac. Abr.* 133 (7th ed.), tit. *Habeas Corpus* (B) 10. [*Erle* J. Each committal states a distinct summons and adjudication: why do you ask us to infer that the three are for the same cause?] There can, under the statute, be only forty days' imprisonment. [*Coleridge* J. Sect. 103 appears to be framed with the direct intention of giving a power of further imprisonment if there be further default.] For that there should be a new order under sect. 100. The judge has otherwise a power of perpetual imprisonment upon a single judgment. [*Coleridge* J. Why should he not, as long as the debtor persists in not paying what he has the means of paying?] That construction would really amount to an indulgence to a vindictive creditor. [*Coleridge* J. What harm can the vindictive creditor do if the debtor will pay? Has not a commissioner of bankrupt a power of perpetual im-

prisonment as long as the bankrupt refuses to answer?] The Legislature cannot have meant to give such a power to an inferior tribunal, especially as there is no appeal.

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No one appeared in support of the return.

Lord CAMPBELL C. J. I am of opinion that the prisoner must be remanded. The warrant of commitment is clearly good on its face; for it follows the statute (a). It recites a judgment, a summons, and that since the judgment the debtor has had means to satisfy the judgment. The validity of the commitment can therefore not be contested. Then we are required to look at the preceding commitments. But I find nothing in them precluding the proceeding on the last warrant, or shewing its illegality. It is perfectly consistent with all three that the judge, on the second and third summons, investigated the means of the debtor, and found that he had received money with which he might pay the debt, but that he on each occasion refused payment. If that appeared, I think the judge had, under sect. 103, the power then to order the debtor to be imprisoned for a space not exceeding forty days; for that would be a new default. If the debtor has the means of paying and refuses to pay, the judge has authority, again and again, to make out a fresh warrant of commitment. We must presume that the judge has done his duty. And I think he did so, if the debtor, having the means of payment, continued to refuse to pay. The judge exercised the power given to him by sect. 103, a very valuable power given by the Legis-

(a) See *Schedule of Forms to Rules of Practice for the County Courts of England*, made in pursuance of stat. 12 & 13 Vict. c. 101. s. 12., and having the force of an Act of Parliament. *Pollock's Practice of the County Courts*, Appendix, p. 115.

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lature, and which will, no doubt, be exercised with discretion. Here is a debt of three pounds odd: the debtor is imprisoned, first for seven days, afterwards for forty, and then for forty more: and we must presume that the judge, in ordering these imprisonments, did his duty. Our only course, therefore, is to remand.

COLERIDGE J. I am of the same opinion. The case turns on the answers to be given to two questions. The first is as to the point raised by Mr. *Francis*, whether there can be more than one imprisonment at all upon what he calls the same ground. If one imprisonment exhausts all power which the judge has except under sect. 100, this commitment could not be sustained; for the power has certainly been exercised more than once. But I cannot discover the least foundation for such a construction. There might be, within the words of sect. 103, a "new fraud or other default" ejusdem generis with that upon which the previous imprisonments had been founded: it would not be the less new for being of the same kind with what had preceded. See how unreasonable the construction would be. A party refuses to pay: a judge passes probably a light sentence as for a first offence: then the party, by an imprisonment of seven days, is to acquire the power of retaining the means of paying without paying. I think it abundantly clear that, upon a new instance of default of the same kind with a former default, the judge has the power of imprisonment, and toties quoties. Then, secondly, does it sufficiently appear upon this return that the last commitment was for a new default? I think it does, when we make the fair intendment that the judge has done his duty, and when we take care not to strain the language either

way. We must take the statement in the warrant to be conclusive as to the facts. Now that statement is that the debtor had, at the time of the commitment, sufficient means, and refused to pay. Mr. *Francis* requires us to assume that this is the first refusal, not a new one. Why are we to do so? The words are much more consistent with a new refusal. It would be a curious construction to suppose a state of facts which would make the judge's conduct unreasonable.

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ERLE J. I am of the same opinion. Under sect. 103 the judge has power to commit for not exceeding forty days when there is a new fraud or other default. I think this is the proper form of commitment for such a case, and that it sufficiently follows the statutory form; there is no special form given for a commitment on a new default. There being thus jurisdiction, and the form being parliamentary, the prisoner should be remanded. Mr. *Francis* insists upon it that the default must be taken to be the same as that on which the first commitment was founded: but the commitments, to which he refers us, prove the contrary. We find in each a summons and a commitment: from which we naturally infer a new default on each occasion, giving jurisdiction.

CROMPTON J. I am of the same opinion; and really I cannot see a doubt. Sect. 103 meant to meet a case of this sort: it enacts that no imprisonment under sect. 99 shall satisfy the debt, nor protect the debtor from being again summoned for any new fraud or other default. This shews that after one default there may be another, as where the debtor, having money, persists in refusing to pay. There is nothing in any part of the

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statute inconsistent with a fresh committal under such circumstances. It is suggested that this construction leads to hardship because it may produce a perpetual imprisonment. But the assumption is that the debtor has money and will not pay. The form of the last commitment is quite proper. We cannot possibly say that it relates to an old default without falsifying the return.

Prisoner remanded.

Tuesday,
June 7th.

The EASTERN UNION Railway Company *against*
The EASTERN COUNTIES Railway Company.

Declaration
by the U.
Railway Com-
pany against
the C. Railway

THE declaration stated that plaintiffs are proprietors
of and carriers over a railway called *The Eastern*

Company, stated that the plaintiffs were proprietors of and carriers over the *U. Railway*, and defendants of and over a railway from *London to Colchester* (the *C. Railway*): that the railways joined at *Colchester*; that differences had arisen between plaintiffs and defendants as to what arrangements should be made by them, respectively, for affording proper facilities, conveniences and accommodation for the interchange and transmission of traffic from one railway to, upon and along the other: that by statute it was enacted that, if plaintiffs or defendants should so require, within fourteen days after notice, it should be referred to arbitration, in the manner provided by The Companies Clauses Consolidation Act, 1845, with respect to settlement of disputes by arbitration, to determine what arrangements should be made by plaintiffs and defendants, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods, to be conveyed from the *U. Railway*, or any part thereof, upon and along the *C. Railway*, between *London and Colchester*, or any part thereof, and from the *C. Railway* between *London and Colchester* or any part thereof, and upon and along the *U. Railway*, or any part thereof: and to determine the terms and conditions on which such use, conveyance and accommodation should be afforded; and generally to determine all matters incident to the arrangements before mentioned, or which might be necessary or expedient for giving effect to the same: and that it should be competent for the arbitrators to order and direct plaintiffs and defendants to do all such acts as might be necessary and expedient for carrying the arrangements into effect, and to determine that, for each default, the Company in default should pay to the other such sum, by way of liquidated damages, as the arbitrators might appoint: such damages, if above 50*l.*, to be recoverable in any Court of competent jurisdiction: provided that neither Company should be authorized to run locomotives on the line off the other.

Held that the arbitrators had power to order:

1. That the defendants should run every day, except *Sundays*, an express train from the

Union Railway; and the defendants are proprietors of and carriers over a railway from *London* to *Colchester*; and the said railways join and communicate with each other at *Colchester* aforesaid: and, before the passing of the Act next mentioned, various differences had arisen between the plaintiffs and defendants as to what arrangements should be made by them respectively for affording proper facilities, conveniences and accommodation for the interchange and transmission of traffic from one of the said railways to, upon and along the other: and by The Eastern Union Railway Amendment Act, 1851 (*a*), it was enacted (*b*) that, if, at any time or times after the passing of the said Act, either the plaintiffs or the defendants should so then require, then within fourteen days after a notice in writing by the Company so requiring, under the hand of the secretary, addressed to the other Company, and delivered to the secretary or left at the chief office thereof, it should be referred to arbitration in the manner provided by The Companies Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration, to

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Colchester
Junction to
their *London*
station, de-
parting at
10 A.M. and
arriving at half
past 11 A.M.,
stopping at
three inter-
mediate sta-
tions; which
was admitted
to be a speed
of thirty six
miles per hour.
For that the
times of de-
parture and
arrival were
circumstances
which properly
made part of
the arrange-
ment, and the
Court could
not intend

that the speed was improper, in the absence of any allegation to that effect. And that it was no objection that the award did not limit the time during which the arrangement was to continue, as new regulations might be made, under the arbitration clause, from time to time.

2. That the defendants should run an express train, with specified times of departure and arrival, from their *London* station to the *Colchester* Junction.

3. That the defendants should convey, from the *U. Railway*, on the *C. Railway*, the carriages and luggage vans, which had been used on the *U. Railway* for the passengers brought thereon to *Colchester*, to *London* for the conveyance of such passengers and their luggage.

So held, upon demurrer to a declaration for the liquidated damages for non-compliance with the above orders.

(*a*) 14 & 15 *Vict. c. lviii.*, local and personal, public, "to facilitate intercourse between the *Eastern Union* and certain other railways; to alter certain charges upon *The Eastern Union Railway* and *The Stowmarket Navigation*; and for other purposes."

(*b*) Sect. 4.

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determine what arrangements should be made by the plaintiffs and the defendants, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods, to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway*, between *London* and *Colchester*, or any part thereof, and from *The Eastern Counties Railway*, between *London* and *Colchester*, or any part thereof, and upon and along *The Eastern Union Railway*, or any part thereof; and to determine the terms and conditions on which such use, conveyance and accommodation should be afforded; and generally to determine all matters incident to the arrangements hereinbefore mentioned, or which might be necessary or expedient for giving effect to the same: and that such reference should be made and conducted in all respects according to the provisions of the said Companies Clauses Consolidation Act, 1845; and the award or determination of the arbitrator or arbitrators, or umpire, as the case might be, should in any such case be binding on the plaintiffs and the defendants, and be carried into effect accordingly: and that it should be competent for such arbitrator or arbitrators, or umpire, as the case might be, in and by any such award, to order and direct the plaintiffs and defendants, or either of them, to do all such acts as might be necessary or expedient for carrying the said arrangements into effect, and also to award and determine that, for each default or evasion thereof, the Company in default should pay to the other of such Companies such sum or sums of money, as and by way of liquidated damages,

as he or they might appoint; and that such damages, if under 50*l*., might be recovered in a summary manner before the justices of the peace for the county of *Essex*, or in any county court of the same county; and, if above 50*l*., might be recovered in any court of competent jurisdiction: Provided always that nothing in the said Act shall be held to authorize either of the said Companies, respectively, to run locomotive engines upon any portion of the line belonging to the other Company. And, after the passing of the said Act, plaintiffs, by a notice in writing dated 20th *December* 1851, under the hand of their then secretary, and addressed to the defendants, and duly delivered to the defendants' secretary, required of the defendants that within fourteen days it should be referred to arbitration, in the manner provided by The Companies Clauses Consolidation Act, 1845, to determine the various matters and things by the said Eastern Union Railway Amendment Act, 1851, authorized and directed to be so determined, and which are hereinbefore mentioned. And plaintiffs and defendants did not concur in the appointment of a single arbitrator: and afterwards plaintiffs duly nominated and appointed *Charles Locock Webb* to be an arbitrator &c., and defendants duly nominated and appointed *George Parker Bidder* to be an arbitrator &c.; and *Webb* and *Bidder* took upon themselves the reference, and, before entering upon it, duly appointed an umpire &c. upon matters on which they should differ: and *Webb* and *Bidder* duly considered the matters so referred to them; and afterwards, on 23d *February* 1853, made their award in writing, of and concerning the premises, and

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thereby awarded, determined, ordered and directed that defendants should, for the conveyance and accommodation of passengers to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway* to the several stations following, that is to say, to the station at *Marks Tey* otherwise *Marks Tey Junction*, to the station at *Chelmsford*, to the station at *Romford*, and to the station at *Shoreditch*, run, daily and every day (except *Sunday*), an express or quick train from the said junction of the line of the defendants with the line of the plaintiffs at *Colchester*, in the county of *Essex*, to the station at *Shoreditch* in the county of *Middlesex*, and should cause such express or quick train to depart, daily and every day, except *Sundays*, from the junction at *Colchester* aforesaid, at the hour of ten of the clock in the forenoon, and to stop at the stations at *Marks Tey*, otherwise *Marks Tey Junction*, at *Chelmsford*, and at *Romford*, and to arrive at the said station at *Shoreditch* at or before half past eleven of the clock in the forenoon of the same day, and by such trains should carry and convey all such passengers to be conveyed as aforesaid; and that, for each and every wilful default or evasion thereof, defendants should pay plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And *Webb* and *Bidder* did, by their said award, further award, determine, order and direct, that the defendants should, for the conveyance and accommodation of passengers to be conveyed upon and along *The Eastern Union Railway* or any part thereof, from the several stations of the defendants following, that is to say: the station at *Shoreditch*, the station at *Chelmsford*, and the station at *Marks Tey*,

otherwise *Marks Tey Junction*, run an express or quick train from the station of the defendants at *Shoreditch* aforesaid to the said junction of the line of defendants and the line of the plaintiffs at *Colchester* aforesaid, and should cause such express or quick train to depart, daily and every day (*Sundays* excepted), from their station at *Shoreditch* aforesaid at forty five minutes past the hour of seven of the clock in the afternoon, and to stop at the said stations at *Romford*, at *Chelmsford*, and at *Marks Tey*, otherwise *Marks Tey Junction*, and arrive at *Colchester* aforesaid at or before fifteen minutes past the hour of nine of the clock in the afternoon of the same day: and should, by such train, convey all such passengers as should offer themselves to be so conveyed as aforesaid: and that, for each and every wilful default or evasion thereof, the defendants should pay to the plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that defendants should use and employ, for the conveyance of the same passengers and passengers' luggage on their said railway, all such carriages or carriage, luggage vans or luggage van, as should have been used and employed on *The Eastern Union Railway* for the conveyance of the same passengers and passengers' luggage, and which should be tendered to the defendants and ready for their use and employment, at the said Junction at *Colchester*

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as aforesaid five minutes at least before the departure from *Colchester* aforesaid of any train or respective trains of defendants: and that, for each and every wilful default or evasion thereof, defendants should pay to plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from *The Eastern Counties Railway*, or any part thereof, upon and along *The Eastern Union Railway*, or any part thereof, *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that defendants should deliver over to plaintiffs, at the Junction at *Colchester*, all such carriages and carriage, luggage vans and luggage van, as should have been used and employed in their said railway for the conveyance of the same passengers and passengers' luggage as plaintiffs should require to be used and employed by them for the conveyance of the same passengers and passengers' luggage on their said railway, or any part thereof: and that, for each and every wilful default or evasion thereof, defendants should pay to plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that any notice given by the station master for the time being of plaintiffs at *Colchester* aforesaid to the station master for the time being of defendants, or to such person as should from time to time be in charge of their said station at *Colchester*, that any such carriages or carriage, luggage vans or luggage van, were or was ready to be conveyed or received, as the case might be, should be deemed and taken to be a requirement of the said carriages or carriage, luggage

vans or luggage van, within the meaning of the word "required," as used in the two several clauses of the said award last aforesaid." Averments of notice to defendants of the said award and of general performance by plaintiffs. Breach: That defendants have not, since notice of the award, run an express train from the Junction at *Colchester* to the station at *Shoreditch*, nor caused such express train to depart daily &c. (negating the performance of this part of the award, substantially in the terms of the award): but, on the contrary, on three days not being *Sundays*, have neglected &c.: whereby defendants became liable to pay to plaintiffs 60*l.*, the amount of three several penalties of 20*l.* And, further, defendants have not always, since notice &c., run an express train from the station at *Shoreditch* to the Junction at *Colchester*; nor have they caused such express train to depart, daily &c. (following the corresponding part of the award): but, on the contrary, on three days not being *Sundays*, have neglected &c.; whereby defendants became liable to pay to plaintiffs the further sum of 60*l.*, being the amount of three such penalties &c. And, further, defendants have not, since notice &c., used or employed, for the conveyance over their railway of passengers and passengers' luggage to be conveyed from *The Eastern Union Railway* or any part thereof upon and along *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, all such carriages &c. as had been used and employed in *The Eastern Union Railway* for the conveyance of the same passengers &c.; but, on the contrary, on two occasions, have neglected so to do: although on each occasion

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notice was given by the station master of plaintiffs &c. (as in the corresponding part of the award): whereby defendants became liable to pay to plaintiffs the further sum of 40*l.*, being the amount of two several penalties &c.

Plea 1. As to so much of the declaration as charges that defendants have not run, daily &c., an express train from the Junction at *Colchester* to the station at *Shoreditch*, and have not caused such train to depart, daily &c., at ten &c., and to stop and arrive as aforesaid: demurrer. Joinder.

2. As to so much as charges that defendants have not run an express train from the station at *Shoreditch* to the Junction at *Colchester*, and have not caused such train to depart, daily &c., and to stop and arrive as aforesaid: demurrer. Joinder.

3. As to so much of the declaration as charges that defendants did not convey from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, all such carriages or carriage, luggage vans or luggage van, as had been used and employed on *The Eastern Union Railway*, for the conveyance of the same passengers and passengers' luggage: demurrer. Joinder.

Sir *F. Kelly*, for the defendants. First, the arbitrators have exceeded their power in directing that the defendants should run an express train from the *Colchester* Junction to the *Shoreditch* station with prescribed times of departure and arrival. It may perhaps be even questioned whether their power extended beyond directing

that a train should be run per day, leaving the directors of *The Eastern Counties Railway Company* to order the details. [*Crompton J.* Would such a limitation of his power be consistent with his determining "what arrangements should be made" "for affording proper facilities and convenience for the conveyance and all other accommodation of passengers," &c.?] Undoubtedly it might fairly be suggested that the number of trains and the hours of starting form a reasonable part of the arrangement: and the defendants do not attach much importance to this part of the question. The most important question is, Whether the arbitrators had power to prescribe the speed of the express train, so as to require that the distance from *Colchester* to *London* should be performed in an hour and a half, with three stoppages (*a*). The Court cannot take judicial notice of what is or is not a dangerous speed: but, for the present purpose, it is a sufficient objection that the prescribed speed may be dangerous: the Company will not be relieved of the responsibility by the award. [*Coleridge J.* Might you not urge the same argument against any regulation respecting the number of trains?] Perhaps in that respect it is not so easy to put an extreme case. [*Lord Campbell C. J.* If what the award prescribes is in fact dangerous, the Company ought not to obey it: there are means of avoiding such a consequence. *Crompton J.* What would be the legal consequence of the Company being ordered to run the trains at a speed which is in fact dangerous? Would they be responsible, if they

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(a) The counsel agreed that this might be taken to be an actual speed of thirty six miles per hour.

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obeyed?] It may perhaps be admitted that they would not. [Lord *Campbell* C. J. I do not assent to that admission: the award would, on that supposition, become illegal, and then ought not to be obeyed.] That view of course strengthens the argument for the defendants. Further, the arbitrators have ordered the defendants to run the trains, as specified, without any limitation as to the time for which the arrangement is to prevail: it cannot have been intended to intrust them with such a power. If, however, the Court pronounce that the defendants may, by dissenting from the arrangement, subject the arrangement to a fresh reference from time to time, that will remove this objection. It seems that the arbitrators ought to have directed that the arrangements should continue till otherwise awarded. [Lord *Campbell* C. J. That is surely implied.] That satisfies the defendants.

Secondly. The arbitrators had not the power to order the defendants to run a train from *Shoreditch* to the *Colchester Junction*. The intention of the Legislature was that arrangements should be made for conveying the passengers &c. of *The Eastern Union Railway Company* from the Junction to *London*: but it was not meant that the defendants should furnish a train for the purpose of providing passengers for *The Eastern Union Railway Company* from *London*. Sect. 4 points only to the carriage from *The Eastern Union Railway* and from *The Eastern Counties Railway*.

Thirdly. The award requires the defendants, not only to provide conveyances for the passengers &c. of *The Eastern Union Railway Company*, but also to forward

the identical carriages which have been employed by *The Eastern Union Railway Company* in bringing their traffic to the Junction. [Lord Campbell C. J. Can we say that that may not be an arrangement for affording proper facilities for the conveyance?] The question is, Whether this is within the power of the arbitrators. It may be asked, What is to become of the carriages and vans after they arrive in London?

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Bramwell, contra, was stopped by the Court.

LORD CAMPBELL C. J. I cannot say whether this award be favourable or unfavourable to the defendants, expedient or inexpedient. I am required only to determine whether the arbitrators have acted ultra vires. The two Companies, finding that they are likely to have conflicting interests, very properly, by the aid of the Legislature, agree that their disputes shall be settled by arbitration. (His Lordship then read sect. 4.) I am of opinion that this justifies every part of the award which has been brought to our notice. Sir *Fitzroy Kelly* in the first case generally objected, but rather faintly, to the arbitrators determining the number of trains and the hours of starting. But he objected very strongly to the particular regulation that a train should start from the *Colchester* Junction at ten, and arrive, with three stoppages, at the *Shoreditch* Station at half past eleven: a speed which, it seems, is thirty six miles per hour. I cannot say that this is an unlawful speed. If there be danger in such speed, beyond all doubt it was beyond the power of the arbitrators to give such a direction. But, without an allegation to that effect, how can I say

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that it is dangerous? It may, for any thing that appears, be a reasonable speed. An allegation that it is a dangerous speed would be an answer to the declaration: but on this demurrer I cannot assume the fact to be so. Then, as to the general power of determining the speed, the passengers would be in a pitiful plight who, expecting to reach *London* in time to transact their business there, found themselves detained on the line till sunset. As to the next objection, that no time is limited during which the specified arrangement is to prevail, the construction is that suggested by Sir *Fitzroy Kelly*: it must prevail till further order be made in that behalf. Such further order is clearly within the fourth section. The second demurrer is wholly unfounded. Under the words of sect. 4 there must be a reciprocity, a power to direct the conveyance from *London* to *Colchester* as well as that from *Colchester* to *London*. Sect. 4 prevents *The Eastern Union Railway Company* from carrying their own passengers on *The Eastern Counties Railway* by their own locomotives, but clearly enables the arbitrators, for the convenience of passengers whose destination is *The Eastern Union Railway*, to direct a train to start from *London* on *The Eastern Counties Railway*, and arrive at *Colchester*, at given times. As to the direction that the defendants shall carry the carriages and vans which have brought the passengers and goods of *The Eastern Union Railway Company* to the *Junction*, surely that falls within the words "for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods." Whether what the arbitrators have determined be convenient or inconvenient I cannot say: they clearly have not

exceeded their power. I think, therefore, that there must be judgment for the plaintiffs.

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COLERIDGE J. The only question is, Whether the arbitrators have done more than "determine what arrangements should be made" by the two Companies, or either of them, "for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway*, between *London* and *Colchester*, or any part thereof, and from *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, and upon and along *The Eastern Union Railway*, or any part thereof." If they have done no more, they have not exceeded their power. No argument can be sustained on the supposition that they have made regulations which may produce danger and so be unlawful. For, if they have done so, that should appear on the declaration or plea: and even from Sir *Fitzroy Kelly's* own argument it appears that he cannot enter into the question of fact. The principal question raised is as to the speed. Now is it not patent to every person that speed, above all other things, is that which affords proper facilities and convenience for the conveyance? If it be not, I do not know what is. To say that the particular arrangement produces an improper speed is only to say that the award goes beyond the power of the arbitrators and need not be obeyed. But the impropriety does not appear. Then it is contended that the arbitrators had no power to order the running of trains to bring passengers from *London* to *The Eastern Union Railway*.

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thereby awarded, determined, ordered and directed that defendants should, for the conveyance and accommodation of passengers to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway* to the several stations following, that is to say, to the station at *Marks Tey* otherwise *Marks Tey Junction*, to the station at *Chelmsford*, to the station at *Romford*, and to the station at *Shoreditch*, run, daily and every day (except *Sunday*), an express or quick train from the said junction of the line of the defendants with the line of the plaintiffs at *Colchester*, in the county of *Essex*, to the station at *Shoreditch* in the county of *Middlesex*, and should cause such express or quick train to depart, daily and every day, except *Sundays*, from the junction at *Colchester* aforesaid, at the hour of ten of the clock in the forenoon, and to stop at the stations at *Marks Tey*, otherwise *Marks Tey Junction*, at *Chelmsford*, and at *Romford*, and to arrive at the said station at *Shoreditch* at or before half past eleven of the clock in the forenoon of the same day, and by such trains should carry and convey all such passengers to be conveyed as aforesaid; and that, for each and every wilful default or evasion thereof, defendants should pay plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And *Webb* and *Bidder* did, by their said award, further award, determine, order and direct, that the defendants should, for the conveyance and accommodation of passengers to be conveyed upon and along *The Eastern Union Railway* or any part thereof, from the several stations of the defendants following, that is to say: the station at *Shoreditch*, the station at *Chelmsford*, and the station at *Marks Tey*,

otherwise *Marks Tey Junction*, run an express or quick train from the station of the defendants at *Shoreditch* aforesaid to the said junction of the line of defendants and the line of the plaintiffs at *Colchester* aforesaid, and should cause such express or quick train to depart, daily and every day (*Sundays* excepted), from their station at *Shoreditch* aforesaid at forty five minutes past the hour of seven of the clock in the afternoon, and to stop at the said stations at *Romford*, at *Chelmsford*, and at *Marks Tey*, otherwise *Marks Tey Junction*, and arrive at *Colchester* aforesaid at or before fifteen minutes past the hour of nine of the clock in the afternoon of the same day: and should, by such train, convey all such passengers as should offer themselves to be so conveyed as aforesaid: and that, for each and every wilful default or evasion thereof, the defendants should pay to the plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from *The Eastern Union Railway*, or any part thereof, upon and along *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that defendants should use and employ, for the conveyance of the same passengers and passengers' luggage on their said railway, all such carriages or carriage, luggage vans or luggage van, as should have been used and employed on *The Eastern Union Railway* for the conveyance of the same passengers and passengers' luggage, and which should be tendered to the defendants and ready for their use and employment, at the said Junction at *Colchester*

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as aforesaid five minutes at least before the departure from *Colchester* aforesaid of any train or respective trains of defendants: and that, for each and every wilful default or evasion thereof, defendants should pay to plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from *The Eastern Counties Railway*, or any part thereof, upon and along *The Eastern Union Railway*, or any part thereof, *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that defendants should deliver over to plaintiffs, at the Junction at *Colchester*, all such carriages and carriage, luggage vans and luggage van, as should have been used and employed in their said railway for the conveyance of the same passengers and passengers' luggage as plaintiffs should require to be used and employed by them for the conveyance of the same passengers and passengers' luggage on their said railway, or any part thereof: and that, for each and every wilful default or evasion thereof, defendants should pay to plaintiffs, as and by way of liquidated damages, the sum of 20*l*. And *Webb* and *Bidder* did, by their said award, further award, determine, order and direct that any notice given by the station master for the time being of plaintiffs at *Colchester* aforesaid to the station master for the time being of defendants, or to such person as should from time to time be in charge of their said station at *Colchester*, that any such carriages or carriage, luggage vans or luggage van, were or was ready to be conveyed or received, as the case might be, should be deemed and taken to be a requirement of the said carriages or carriage, luggage

vans or luggage van, within the meaning of the word "required," as used in the two several clauses of the said award last aforesaid." Averments of notice to defendants of the said award and of general performance by plaintiffs. Breach: That defendants have not, since notice of the award, run an express train from the Junction at *Colchester* to the station at *Shoreditch*, nor caused such express train to depart daily &c. (negating the performance of this part of the award, substantially in the terms of the award): but, on the contrary, on three days not being *Sundays*, have neglected &c.: whereby defendants became liable to pay to plaintiffs 60*L.*, the amount of three several penalties of 20*L.* And, further, defendants have not always, since notice &c., run an express train from the station at *Shoreditch* to the Junction at *Colchester*; nor have they caused such express train to depart, daily &c. (following the corresponding part of the award): but, on the contrary, on three days not being *Sundays*, have neglected &c.; whereby defendants became liable to pay to plaintiffs the further sum of 60*L.*, being the amount of three such penalties &c. And, further, defendants have not, since notice &c., used or employed, for the conveyance over their railway of passengers and passengers' luggage to be conveyed from *The Eastern Union Railway* or any part thereof upon and along *The Eastern Counties Railway* between *London* and *Colchester*, or any part thereof, all such carriages &c. as had been used and employed in *The Eastern Union Railway* for the conveyance of the same passengers &c.; but, on the contrary, on two occasions, have neglected so to do: although on each occasion

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the said *P. M'Cue* do pay unto the said *E. Grimes*, the mother of the said bastard child, so long as she shall live, and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of 1s. 6d. per week, henceforth, until the said child shall attain the age of thirteen years, or shall die, or the said *E. Grimes* shall marry:" with costs.

From the affidavit, it further appeared that, at the time of making the order, *E. Grimes* was a married woman: and her husband, *James Grimes*, then was, and for several years had been, absent from her, residing as a convict under sentence of transportation in *Van Diemen's Land*. *M'Cue* continued, under the order above mentioned, to pay the sum of 1s. 6d. weekly to *E. Grimes* up to and until 16th November 1852, about which time *James Grimes* returned to *England* and began to live with his wife *E. Grimes*. *James Grimes* absconded from his wife in about six weeks from that time, and had never been again heard of. *Patrick M'Cue* refusing to pay any more money, *E. Grimes* exhibited an information upon oath before a justice, stating the order, that the child was living and under thirteen years of age, that she herself had not been married since the order, and that *M'Cue* was in arrear 19s. 6d., for thirteen weeks. On this information she obtained a summons for the apprehension of *M'Cue*, and for having him brought before the justices of the division. He appeared accordingly; when *E. Grimes* applied for a warrant of distress. The justices adjourned the hearing to 8th

March 1853. On that day *M^cCue* again appeared, before Messrs. *Pilkington* and *Sillar*; when the above facts were proved upon oath. But the justices, as deposed, "did then and there refuse to grant their distress warrant, as required by said *Elizabeth Grimes*, on the ground that said *Patrick M^cCue* was not liable to pay to said *Elizabeth Grimes* the weekly sum of 1s. 6d., as directed by said order, he being, in the opinion of said last mentioned justices, discharged from said order, by reason of the husband of said *Elizabeth Grimes* having returned and cohabited with her in manner herein aforesaid."

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The affidavit in answer did not introduce any material variation from the above statement.

Pashley now shewed cause. First: the magistrates, under sect. 3, have a discretion: "they *may* adjudge the man to be the putative father of such bastard child; and they *may* also, *if they see fit*, having regard to all the circumstances of the case, proceed to make an order on the putative father:" the sum to be paid "may, if the said justices think fit, be calculated" as there mentioned. [Lord *Campbell* C. J. All this refers to the original order of maintenance.] It does so: but the language is permissive throughout: a single justice "may," if the money be not paid, order the putative father to be brought before two justices; and, if he refuse to pay, the two justices "may," by warrant, direct the sum to be recovered by distress. In *Lumley's Act for the further Amendment of the Laws relating to the Poor &c.*, (3d. ed.) p. 43. note 5, it is said: "it will be seen that it is quite in the discretion of the justices whether

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they will or will not enforce the order; consequently, if the child cease to be dependent for support upon the mother, or if her conduct be such as to disentitle her to the remedy, the justices will doubtless deem it right to withhold this process." These provisions differ materially from those of stat. 18 *Eliz.* c. 3. s. 2., under which the justices had no discretion to abstain from acting: one main object there was the punishment of the parties. [Lord *Campbell* C. J. But it appears that here the justices refused the order, not in any exercise of discretion, but on the ground that the father was discharged from liability.] A man marrying the mother of a bastard child was made liable to the maintenance, under stat. 4 & 5 *W.* 4. c. 76. s. 57. [Lord *Campbell* C. J. Before that enactment, it was found that a woman with a bastard was often thought to be a prize.] The discretion is apparently lodged in the justices in contemplation of the various abuses which might follow from giving in all cases an absolute right to the payment. Secondly: sect. 5 of stat. 7 & 8 *Vict.* c. 101. provides that no order of maintenance shall be of any force or validity after the marriage of the mother. Now, in the first place, the order can have no force at all unless a woman, circumstanced as the mother here was, be quasi a single woman within the meaning of sect. 2. But, in that case, her beginning to live anew with her husband is a quasi marriage. And there seem to be good reasons for this construction. The mother, by stat. 7 & 8 *Vict.* c. 101., is entrusted with the money paid for the maintenance: but, if she lives with a husband, he will have the controul of it. Under sect. 6 she is punishable as a

rogue and vagabond if she deserts her bastard child: but her husband might compel her to do so. Thirdly: sect. 2 is inapplicable altogether to such a case. The enactment is confined to "single" women. To hold that a woman, under such circumstances as the present, is single, is, in effect, to hold that in all cases of non-access a married woman is a single woman. In *Rex v. Luffe* (a) it was held that the child of a married woman, where non-access of the husband could be shewn, was a proper subject of an order of filiation under stats. 18 *Eliz. c. 3. s. 2.* and 6 *G. 2. c. 31. s. 1.*, though the latter has the words "single woman." But the policy of stat. 7 & 8 *Vict. c. 101.* put an end to the effect of the order when the woman marries: the word "single" will therefore be used in its ordinary sense. [Lord Campbell C. J. Then what is to become of such bastards?] It may well be supposed that the Legislature did not contemplate the case, which must be of extreme rarity, of a child of a married woman shewn to be a bastard only by proof of non-access. It might be asked, too, what is to become of the bastard of an unmarried woman, after her marriage, if she dies: for the order is not valid after the marriage, and the husband's liability ceases on the wife's death. By common law, he is not even liable to maintain the legitimate children of his wife by a former marriage; *Cooper v. Martin* (b). The provisions of the Act appear to be generally inapplicable to the case of a married woman. The money, under sect. 5, is to be paid to the mother, and thus will be under the husband's controul: but, under stat. 4 & 5 *W. 4. c. 76. s. 72.*, this was expressly forbidden. On this

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(a) 8 *East*, 193.(b) 4 *East*, 76.

1853. point, *Regina v. Collingwood* (a) is undoubtedly an express authority in favour of the rule. But in that case the different policy of the several statutes seems not to have been sufficiently adverted to. In *Lumley* (3d. ed.) p. 40, note 1, it is said: "A single woman is not necessarily a spinster;" "and consequently these words will apply to a widow who may be pregnant with, or may have a bastard; but they do not appear to be applicable to a married woman living away from her husband; and the whole of the new provisions, one of which is that the order shall not continue after the marriage of the woman," "are unsuited to such a case." Whatever reasons are valid against the argument now urged on the third point seem to strengthen the argument on the second point.

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Bodkin, contrà, was stopped by the Court.

LORD CAMPBELL C. J. The question seems to me to turn on the question, whether the mother here can be called a single woman: if she cannot, cadit questio. Now this question has been solemnly decided in the affirmative, after time taken for consideration. We are not, it is true, absolutely bound by that decision: but we should adhere to it unless very strong reasons were adduced against it. In *Rex v. Luffe* (b) the same interpretation was put by this Court on the word as used in the earlier statute; and it was held that a married woman may, under such circumstances as these, be considered single in the sense intended by a statute

(a) 12 Q. B. 681.

(b) 8 East, 193.

which provides for the maintenance of bastards. It would be strange if one class of bastards, though small, were left entirely destitute, and there were no liability in the putative father. Yet that would be the consequence of our putting the interpretation which is suggested on stat. 7 & 8 *Vict. c. 101*. I think, therefore, that Mr. *Pashley's* interpretation is not the correct one, and that this woman, though married, is single in the sense intended by the statute. If so, the order of maintenance is good; and, that order being good, the first question is whether the justices have a discretion as to enforcing it. They certainly have a discretion for some purposes: and, had they abstained from enforcing the order in the exercise of their discretion, we could not have interfered. If, for instance, they had examined into the circumstances of the putative father and mother, and, upon such examination, had determined not to enforce the order, that would have been an exercise of their discretion which we should not have controuled. But from the affidavits it appears that this is not what has occurred; they have refused to grant their warrant on the ground that the party is discharged from his liability: that is, in effect, declining jurisdiction. As to the husband's return, in *Rex v. Collingwood* (a) the decision was on general grounds: it did not appear that the husband was suffering transportation: he might have been in *Scotland*, or in *England* indeed, if he had not access to his wife. The liability of the putative father, in this case, cannot therefore be affected by the return of the husband from transportation. I think, therefore,

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(a) 12 Q. B. 681.

1858. that the magistrates were wrong in not exercising their power, and that the rule must be made absolute.

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COLERIDGE J. I am of the same opinion. As to Mr. *Pashley's* first point: it is true that sect. 3 of stat. 7 & 8 *Vict. c.* 101. does give a discretion to the justices; but that is a discretion whether they will enforce an order assumed to be valid. Here they refuse to exercise their discretion. As to the last point: the question is raised by the apparent difference in the language of stat. 18 *Eliz. c.* 3. s. 2. and 7 & 8 *Vict. c.* 101., the latter using the word "single," the former not. But in *Rex v. Luffe* (a) stat. 6 *G. 2. c.* 31. s. 1. was expressly called in aid: and in that statute the same word "single" was used: yet it was held applicable to the case of a married woman having a bastard. Then *Regina v. Collingwood* (b), which was founded upon *Rex v. Luffe* (a), is a decision on the present statute, and is precisely in point. Before we discharge this rule, we must say that both those cases are badly decided. We perhaps might do so, if no valid arguments could be urged in their favour; but it seems to me that there are such arguments.

ERLE J. I am also of opinion that the rule must be made absolute. I concur in the decisions that a married woman, having a bastard, may, for the purpose of the bastardy laws, be called single. I agree also that in this case the woman cannot be said to have married since the order of maintenance was made. And I think that

(a) 8 *East*, 193.

(b) 12 *Q. B.* 681.

the affidavit shews that the magistrates have not exercised a discretion, but have assumed the non-liability of the putative father.

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CROMPTON J. I am of the same opinion. We should not overturn a deliberate decision, especially one long acted on, without very strong reasons for so doing: and it seems to me that we cannot find such reasons in the statute without a strained interpretation.

Rule absolute (a).

(a) *Pashley* afterwards, on the same day, suggested that the rule should not be made absolute in its terms; but that, in order to enable the justices to exercise a discretion, they should be ordered to adjudicate. The Court, however, said that the rule must be made absolute simply.

SCOTT *against* WALKER.

Thursday,
June 9th.

PHIPSON, in this Term, obtained a rule calling on the defendant to shew cause why the plaintiff and

Plaintiff
brought an
action to re-
cover from
defendant a

deed made between *P* and plaintiff. Defendant pleaded a general lien for work done by him as attorney for plaintiff. Under a judge's order, defendant delivered particulars of his lien, which consisted of a bill of costs in an action of *P*. against *G*. Plaintiff applied, under stat. 14 & 15 Vict. c. 99, s. 6, to be at liberty to inspect defendant's day books, bill books, cash books, letter books, ledgers and journals, commencing and concluding at days named, and to take copies of or extracts from such parts as related to the particulars of lien.

In support of the application, plaintiff deposed that he was not indebted to defendant for any part of the costs, but that *P*., if any one, was so indebted. That defendant's day books, &c. (as before), so commencing and concluding, from which books, or some of them, the bill of costs had been taken, would, as defendant believed, furnish material evidence in support of plaintiff's case; and, in particular, would shew that defendant never did any of the work on account of plaintiff, but on account of *P*.; and the inspection was material and necessary to support plaintiff's case. Defendant deposed that he kept no bill book or journal within certain days, within which time he deposed that all the costs were incurred.

Held: that inspection might be granted for obtaining any evidence necessary to support plaintiff's original case, or to meet the defendant's case, though not for information shewing how defendant's case would be supported.

Held also: that the application was too extensive.

But, per Lord Campbell C. J., Coleridge and Crompton J., dissentiente Erle J., the inspection was granted of such entries, in defendant's day books, cash books and ledgers, within the days named by defendant, as related to items of the particulars of lien.

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his attorney should not be at liberty to inspect, at the office of the defendant's attorney, the defendant's day books, bill books, cash books, letter books, ledgers and journals, commencing the 11th *July* 1848, down to and concluding the 17th *May* 1852; and, if necessary, why they should not be at liberty to take copies of, or extracts from, such parts of the same as relate to the particulars of lien delivered by the defendant in this cause.

The rule was obtained on the affidavit of the plaintiff, from which the following facts appeared. The action was to recover from defendant a mortgage deed made between *Richard Parker* and the plaintiff. The plaintiff had declared: and the defendant had pleaded three pleas: 1. Non detinet; 2. That the deed was not the property of the plaintiff; 3. That the defendant held a general lien on the deed for work done by the defendant as attorney for the plaintiff. The defendant, under a Judge's order, had delivered particulars of his alleged lien; which particulars consisted of the defendant's bill of costs in an action of *Parker* against *The Great Western Railway Company*, and also the costs relating to a reference of the said action. The plaintiff now deposed that he never retained or employed the defendant in the action or reference, and was not indebted to the defendant in respect of any part of the bill of costs; but that *Parker* was the party, if any, indebted to the defendant in respect thereof. That the defendant's day books, bill books, cash books, letter books, ledgers and journals, commencing 11th *July* 1848, down to and including 17th *May* 1853, "from which books or some or one of them the said bill of costs has been made, will, as this deponent verily believes, shew that the said *Richard Parker* is the real debtor to the said defendant,

and not this deponent. And this deponent verily believes that all or some or one of the said books will furnish material evidence in support of his, this deponent's, case; and that the inspection of such books, during the period aforesaid, is material and necessary for the support of his, this deponent's, said action: and, in particular, that the same will shew that the defendant never did any part of the work charged for in the said particulars of lien for or on account of this deponent, but for and on account of *Richard Parker* only."

In answer, the defendant made affidavit that the indenture is a mortgage deed, whereby *Parker* assigned to the plaintiff all claims and demands due and owing to *Parker* from *The Great Western Railway Company*, the action having been referred and being then pending. That, after the date of the deed, the defendant acted as attorney for the plaintiff in various matters connected with the action and reference; and, at the commencement of this suit, the defendant had a lien on the deed for his costs and charges so incurred, and for fees paid to counsel by defendant on account of the plaintiff. That the whole of the defendant's costs and charges relating to the action and reference, including those in respect of which the lien arose, the amount having been allowed on taxation, had since the commencement of the suit been paid out of moneys recovered under the reference from *The Great Western Railway Company*, and there was therefore no longer any question as to the amount. That between 11th *July* 1848 and 28th *April* 1851 (within which period all such costs and charges were incurred) the defendant kept no bill book or journal. That all such books as the defendant did keep during the said period were still in frequent use, and were

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required for the purposes of the defendant's business; and therefore it would cause him serious inconvenience to have them removed from his office.

Wise now shewed cause. The affidavit in support of the rule does not bring the case within stat. 14 & 15 *Vict. c. 99. s. 6*. It does not shew that the inspection is necessary to the making out of the plaintiff's case: it appears to be required only to meet an anticipated defence. The case may be considered to be analogous to that of a defendant demurring to a bill for discovery. [Lord *Campbell* C. J. You must assume that such bill sets out the declaration and plea. And there would be a difference between a bill for relief, praying for discovery as incidental thereto, and a bill for discovery simply.] That is so. Another distinction is between a prayer for discovery for the purpose of simply aiding the party in substantiating his complaint, and a prayer for discovery with the object of anticipating a defence. This is illustrated by the remarks upon *Harland v. Emerson* (a) in *Wigram's Points in the Law of Discovery*, 75 (2d ed.). On the plea of Not possessed, the plaintiff has to prove the affirmative: in this he cannot be assisted by evidence from the books; if the defendant has an answer, the plaintiff cannot inspect the books to discover it. The affidavit does not suggest that the inspection would supply any thing material to the plaintiff on this issue. As to the lien, the plaintiff insists that he never employed the defendant at all: the employment must be proved by the defendant affirmatively. *Sneider v. Mangino* (b) shews that the party

(a) 8 *Bligh, N. S.* 62.

(b) 7 *Exch.* 229.

seeking inspection must shew something more than that the evidence wanted may enable him to see what his adversary's case is. And, further, the affidavit shews that the information which the plaintiff seeks is to be derived from a privileged communication. At the least, *Parker's* assent should have been obtained; *Grane v. Cooper* (a). [*Phipson*. That may be made a condition.] Again, the affidavit should shew specifically what is wanted. The Court will not countenance what is analogous to a fishing application; *Bolton v. Corporation of Liverpool* (b), *Smith v. Duke of Beaufort* (c), *Dos Santos v. Frietas* (d). A material misstatement of date is shewn by the defendant's affidavit: that, however, is important only as to a part of the books. Nothing is shewn giving the plaintiff a common law right to inspection, by reason of the instrument asked for being held under such circumstances as to bring the case within *Bluck v. Gompertz* (e).

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Phipson, contra. The plaintiff wants to shew that, as between himself and the defendant, the deed belongs to the plaintiff, which is the question under the issue upon the property of the deed. Therefore, although the defendant would have to prove the lien affirmatively, the plaintiff's case is not made out without the information which is sought. At any rate, the question will arise on the plea of lien. The indefiniteness of the application is complained of. But, where the general nature of the documents is shewn, and the documents are alleged to be evidence for the plaintiff on a case

(a) *Wigram's Points*, §c. 246.

(b) 1 M. & K. 88.

(c) 1 Hare, 507.

(d) *Wigram's Points*, §c. 165.(e) 7 Esch 67. See *Doe dem. Child v. Roe*, 1 E. & B. 279.

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specifically charged, the defendant, if he does not expressly deny that ground, is compellable in equity to give inspection; *Smith v. Duke of Beaufort* (a). Here the nature of the case precludes a more specific description. [Coleridge J. Do you say that, if the lien were not set up, you could require inspection?] No: the object is to negative the lien. [Lord Campbell C. J. You say that inspection may be granted for the purpose of obtaining evidence by which the party applying may negative his opponent's case.] That is so; *The Attorney General v. The Corporation of London* (b): and the doctrine applies here. The entries would not be evidence for the defendant at all. The rule may be modified, if too much be asked. It does not appear that any privileged communication will be disclosed: but that objection may be obviated by making *Parker's* consent a condition.

LORD CAMPBELL C. J. We cannot make the rule absolute in its terms: these are too general. Whatever is in the nature of a fishing application is to be resisted. But we ought to grant one part of the application. I think, as I threw out in the course of the argument, that, where the defendant is in possession of documents which make out, not his own case, but either the case of the plaintiff or the plaintiff's answer to the defendant's case, the plaintiff is entitled to inspection. He is not entitled to inspect that which merely makes out the defendant's case, any more than the defendant is entitled to inspect documents of the plaintiff which merely make out the plaintiff's case. As far as this application

(a) 1 Hare, 507.

(b) 2 Macn. & G. 247.

relates to the inspection of that which contains the particulars of the lien, it may be granted. The affidavit of the plaintiff is not very specific, in merely stating that the bill of costs has been made out from the books: but we must infer that they are believed to contain the entries from which such bill has been made out. These could not be evidence for the defendant; but they may furnish material evidence for the plaintiff. Had this, as we might perhaps have presumed from the beginning of the affidavit, been a mere fishing application, it could not have been sustained. But, where reasonable ground is furnished for believing that what the inquiry seeks is, not the nature of the defendant's case, but the evidence material for the plaintiff's case, the inspection may be granted. The rule must therefore be modified, and strictly confined to entries in the books respecting the particulars of the lien in respect of the action between *Parker* and *The Great Western Railway Company*, and the reference.

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COLERIDGE J. I am of the same opinion. Whether a document supports the *primâ facie* case of the plaintiff or maintains it against the case of the defendants, the evidence is equally in support of the plaintiff's original case, and, if so, is within the principle of the Act. A greater question here is, whether the grounds urged in support of the application be not too vague or general. That we must measure very much by the circumstances of each particular case, especially by the means which the party has of being more specific. Now I do not see how, if we limit the application as my Lord points out, the plaintiff could be more specific in his statement. He is furnished by the defendant with the particulars of

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a lien, which appear to be in respect of an action. The plaintiff says that the defendant must have in his possession documents from which the particulars are made out, and that he, plaintiff, believes that from these documents he shall be able to shew that he was never liable to the defendant, but that *Parker* was. The rule, so limited, should therefore in my opinion be made absolute.

ERLE J. That there must be some limitation, is a principle in which I concur with my learned brethren, as I collect their views. And, as I understand my Lord, I concur in his view that, where particular entries are specified, the plaintiff may inspect them. But it is clear to me that, in making this rule absolute, we are laying down a principle beyond that. I can find in the plaintiff's affidavit nothing more than that the books contain some entries. It comes to this: there are debits, in many items, headed *Parker v. The Great Western Railway Company*; and the plaintiff is to inspect all. I cannot therefore distinguish this from an ordinary case of an action for work and labour, where the plaintiff says, I should like to look at all the documents you have about the matter, in order to find out that you are liable. If the entry were specified, the case would fall within the principle. But I understand the plaintiff as saying that it will appear that his name is not to be found in the books: that, I think, is not within the proper principle of limitation.

CROMPTON J. I also am of opinion that this rule should be made absolute. The principle in question

is very important in the application of the Act. The rule must be taken to be, that the privilege of inspection is confined to those cases where the information is wanted, either to establish the plaintiff's original case, or to enable him to answer the defendant's case. And it is a rule that a party is not to be allowed to look at the evidence of his antagonist, merely for the purpose of picking holes in the antagonist's case; though he may have the inspection when he seeks for evidence for establishing his own case. The question as to privileged communication has been disposed of. The great question is, whether the application and the grounds laid for it be not too general. No doubt we must take it to be established law that a party is not to be entitled to say, if I saw my opponent's books I could find some evidence. That may possibly be done at equity, or under some new law; but it cannot be done under this Act. But here the plaintiff swears that he believes that entries, which he describes, will appear in certain books, shewing that the party charged was not the plaintiff but *Parker*. That is enough to call upon the other party to deny that he has such entries. It is very important, with a view to the practice at Chambers, that the rule should be well understood. One party asserts the existence of such entries; the opposite party says only that there are not any such books as some of those described: from this I collect that there are some such entries in the other books. I do not see any reason why, in an action for goods sold and delivered, the plaintiff should not have inspection of the books in which he believes the articles are entered to his credit. Here the plaintiff says that there are entries to the effect which he

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describes; that is not denied. No harm can be done by making the rule absolute, provided it apply to such entries only as comprehend the items in the particulars.

Ordered: "That the plaintiff and his attorney be at liberty to inspect, at the office of the defendant's attorney, any entries in the defendant's day books, cash books and ledgers, commencing the 11th *July* 1848, down to and including the 28th *April* 1851, which relate to the items of the particulars of lien delivered by the defendant in this cause: and that the plaintiff, upon notice being given to his attorney, be at liberty, if necessary, to take copies of or extracts from such entries."

Friday,
June 10th.

GEORGE DIBBLE *against* THOMAS BOWATER and
ISAAC MORGAN.

A tenant on the morning of the quarter-day fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day. The landlord, after the rent had become in arrear, and within thirty days of the removal,

followed and seized the goods as a distress.

Held, by Lord Campbell C. J., Coleridge and Erle Js., that his seizure was justified under stat. 11 G. 2. c. 19. s. 1., the rent being due and payable, though not in arrear, at the time of the removal. Crompton J. dissentiente, and holding that (whatever might be the proper construction of the statute in a Court of Error) the previous decisions bound a court of co-ordinate jurisdiction to hold that it was essential that the rent should be in arrear at the time of the removal.

DECLARATION for breaking plaintiff's house and carrying away his goods. Plea: That, before 25th *December* 1852, plaintiff held a house as tenant to defendant *Bowater*, at a rent of 26*l.* payable quarterly; that the reversion then belonged to *Bowater*, who was entitled to distrain for the rent. And that, on that day, "one of the said quarterly payments became and was, and at the time when &c. remained, due and payable to" *Bowater*; and that, "after the same had become

due, and when the same was in arrear and unpaid, and within thirty days next before the said time when &c., to wit" 27th *December* 1852, "plaintiff fraudulently and clandestinely removed and carried off from the said premises the said goods and chattels, being the proper goods and chattels of the plaintiff," to prevent a distress: the plea then justified following and seizing these goods in the plaintiff's house, by *Bowater* in his own right, and the other defendant as his servant. Issue on this plea.

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On the trial, before *Coleridge J.*, at the *Westminster* sittings in last *Easter Term*, it appeared that the goods were removed by the plaintiff early on the morning of the 25th *December* 1852, being the day on which the rent became due. The jury, in answer to the learned Judge, said that the goods were fraudulently removed to prevent a distress. The learned Judge thereupon directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant. In the same Term, *Warren* obtained a rule *Nisi* accordingly.

Udall now shewed cause. The plea is not proved. The averment is, that the goods were removed "after the" rent "had become due, and *when the same was in arrear* and unpaid." The proof is, that they were removed on the morning of the quarter day. Now rent is not in arrear till the end of the term day; *William Clun's Case* (a), *Duppa v. Mayo* (b), *Lord Rockingham v. Ozen-den* (c). Had the plaintiff been distrained upon on that day, and replevin been brought, he might have pleaded *riens in arrear*. [Lord Campbell C. J. The distress

(a) 10 Rep. 127 a.

(b) 1 Saund. 282.

(c) 2 Salk. 578. S. C. as *Lord Rockingham v. Penrice*, 1 P. Will. 177.

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could not be made on that day: the point is, Whether, a removal being fraudulent and with intent to avoid an impending distress afterwards, the seizure is justified.] That question does not arise; for the plea avers that the rent was in arrear. [Lord Campbell C. J. It may arise, if that averment is immaterial.] It is of the essence of the plea. That was the ground of the decision of the Common Pleas in *Rand v. Vaughan* (a), approving of *Watson v. Main* (b).

Warren and *Bovill*, in support of the rule. The rent was due at the time the goods were removed, though the tenant had the whole of the day to pay it in. This is proved by *Clun's Case* (c); for there the distinction is pointed out: payment before the term day is voluntary and not satisfactory: but, "if the rent is payable at the feast of *Easter*, if the tenant pays the rent in the morning, and the lessor dies at two hours before noon of the same day: this payment was voluntary, and yet it is a good satisfaction against the heir." The reason must be because the rent is due as a debt in the morning: payment before the day would not be good; *Lord Cromwel v. Andrews* (d). The averment therefore, if material, is satisfied. But, further, it is not material. The words of stat. 11 G. 2. c. 19. s. 1. are: "in case any tenant" &c. "of lands," &c. "upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord" &c. "distraining the same for arrears of rent so reserved,

(a) 1 *New Ca.* 767.(c) 10 *Rep.* 127 a.(b) 3 *Esp. N. P. C.* 15.(d) *Cro. Eliz.* 15.

due, or made payable; it shall and may be lawful to and for every landlord" &c., "within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent." There is nothing in the words of this statute to indicate that the rent must be in arrear: the words are in the disjunctive, "reserved, due, or made payable." On the quarter day the rent is every one of these. [*Crompton J.* But how can it be said to be in arrear? And the cases seem to make "arrears" the emphatic word.] It was no part of the decision in any one of the cases that the rent must be in arrear; for in none of them was the rent either due or payable at the time of the removal. In *Rand v. Vaughan* (a) the removal was the day before the rent became due; in *Watson v. Main* (b) it was several days before. In *Furneaux v. Fotherby* (c) Lord *Ellenborough* seemed inclined to think that, even where the removal was before quarter day, the landlord might follow the goods. These three seem to be all the cases. [*Coleridge J.* There is also a case of *Northfield v. Nightingale*, cited in *Woodfall's Landlord and Tenant* (6th edition) p. 360, which is to the same effect as *Rand v. Vaughan* (a), except that it arose on demurrer to a plea.]

LORD CAMPBELL C. J. We are all opinion that this plea must be amended, so as to be in conformity with the facts, upon proper terms; or else that the question

(a) 1 *New Ca.* 767.

(b) 3 *Esp. N. P. C.* 15.

(c) 4 *Campb.* 136.

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cannot be considered. [After some discussion, this was agreed to by the counsel on both sides.]

LORD CAMPBELL C. J. The plea, then, being considered as amended, I am of opinion that the defendant is entitled to judgment. When there is a fraudulent removal on the term day, it clearly comes within the mischief intended to be prohibited by stat. 11 G. 2. c. 19. s. 1.; but that is not enough; we must also see that it comes within the words of the enactment. On the best consideration I can give to it, I think it does come within the words, which seem to me to require no more than that the rent should be "reserved, due, or made payable." I do not think that there are any words requiring that the rent should be in arrear at the time of the removal. Mr. *Warren* has satisfactorily shewn that rent is in one sense due and payable on the quarter day; for payment on that morning to a tenant for life who dies in the course of the day could not be good against the heir if the rent were not due and payable. But the rent, though due on that day, is not in arrear till the day is elapsed; and there can be no distress till the rent is in arrear. *Rand v. Vaughan* (a) is a decision entitled to the greatest respect: and, if the rent had in that case been due at the time of the removal, the circumstances would have been the same as these. But in that case the removal was before the quarterday; and, in delivering the judgment of the Court, *Tindal* C. J. says: "The short question raised by the pleadings is, whether the statute applies to cases where the tenant

(a) 1 *New Ca.* 767.

removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the statute." That was the judgment of the Court, with which our present decision does not conflict. It is true that *Tindal* C. J. adds some observations, and says: "It is the *place*, therefore, not the *time* of the distress, to which the statute intends to apply the remedy: and, indeed, it is obvious, that if the construction contended for by the defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due, which never could have been intended." I cannot concur in that observation. I think the present case is within the words and mischief of the statute: and, as a decision in favour of the defendant is consistent with the former decisions, though not with the observations made, I think we are not precluded from putting a sense upon the words of the statute such as to effectuate the intention of the Legislature.

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COLERIDGE J. I agree that, as in all the prior cases the removal was before the rent became due, a circumstance which was material and must have been present to the minds of the Judges deciding, we are at liberty to look to the words of the statute and see whether they apply to the present case. Now I think that the words, in case the tenant shall fraudulently remove his goods to prevent the landlord "from distraining the same for arrears of rent so reserved, due, or made payable," do not require that the rent shall be in arrear at the time of the removal. The object of the Legislature was to prevent a removal to avoid a distress,

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which cannot take place until there are arrears. So far the word arrears is introduced only to shew what kind of distress is meant; viz. one "for arrears of rent so reserved, due, or made payable." Then the landlord may follow those goods, and seize them "as a distress for the said arrears of rent." This he cannot do till the rent is in arrear. So it seems to me clear that this case, in which the rent was due, and the goods were removed to avoid a distress for the arrears of rent, and were followed and seized after the rent was in arrear, is within the statute. I cannot think it necessary that the rent should be in arrear at the time of the removal.

ERLE J. A question is raised on the construction of stat. 11 G. 2. c. 19. s. 1. It is, Whether it applies to the following facts. Rent became due on *December* 25th; on that day the tenant fraudulently removed his goods with intent to avoid a distress for that rent. In law, no distress could be made till the following day; but the rent was due at the beginning of *December* 25th, though the tenant had the whole of that day in which to pay it. It seems to me that this case is within the words of the enactment; for the rent was reserved and due: and it is quite clear to my mind that it is within the mischief. We do not overrule any preceding decision; for in no case was the rent due; so that we do not conflict with the decision. We do not run any danger of questioning transactions during an indefinite period, as apprehended in *Rand v. Vaughan* (a): our decision gives a well defined time as the limit within which the removal can be such as to justify following

(a) 1 New Ca. 767.

the goods. We also give full effect to what is observed by *Tindal C. J.*, that the object of the statute was to apply to the place, not the time, of the distress : and I have not been able to see how that observation bears on the time of the removal of the goods ; which is the point before us. It is relevant to the time of the distress, but not to the time of the removal.

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CROMPTON J. We are now considering the question as if the plea had been framed according to the fact, and we were deciding on a motion for judgment non obstante veredicto. And I am not prepared, sitting here in a Court of coordinate jurisdiction with the Common Pleas, to come to the same decision as my Brothers. Whether, looking at the words of the statute alone, without the decided cases, or sitting in a Court of Error, I should come to the same conclusion as they do is another question ; but it seems to me that in the previous decisions the word “due” in the statute was not considered the emphatic word ; it was the word “arrears” on which the Court proceeded. And this must have been so ; for, as was truly observed by Mr. *Warren*, the words are in the alternative, “reserved, due, or made payable.” The Court in *Rand v. Vaughan* (a) seem to me to have proceeded on the word “arrears,” and, rightly or wrongly, to have decided that the effect of that word was to require that the rent should be in arrear at the time of the removal. In the considered judgment of the Court, the reasons are given. *Tindal C. J.* says : “By the common law, the distress for rent was necessarily made upon some part of the demised

(a) 1 *New Ca.* 767.

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premises, otherwise the tenant might rescue the distress, or bring an action of trespass. And it was only in case the landlord coming to distrain saw the cattle on the premises, and the tenant to prevent the distress drove them off the premises, that the landlord could justify freshly following and distraining them." These observations may not have been required by the facts in that case; but they are given as the reasons for the judgment. The Chief Justice proceeds: "And the statutes 8 *Ann. c. 14. s. 2.* and 11 *G. 2.* appear to have been passed with the view of removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises. For it expressly empowers the landlord 'to take and seize such goods, wherever the same shall be found, as a distress for the said *arrear of rent*; and the same to sell and otherwise dispose of in such manner as if the said goods *had been actually distrained by such landlord in and upon such premises for such arrears of rent.*' It is the *place*, therefore, not the *time* of the distress to which the statute intends to apply the remedy." I think that was the great object of the statute; but at any rate the Chief Justice gives these as the reasons for the judgment. I do not see why, if the construction of the statute is that the rent need not be in arrear, it should be necessary that it should be due: it would seem sufficient that it should be "reserved." I think therefore that our decision now interferes with the grounds of the judgment in *Rand v. Vaughan (a)*: and, without expressing any opinion as to what construction ought to be put upon the statute

(a) 1 *New Ca.* 767.

in a Court of Error, I am not prepared, sitting here, to concur with the rest of the Court.

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A rule was afterwards drawn up, ordering "that the verdict obtained in this cause be set aside, and a verdict entered for the defendants instead thereof. The plea herein to be altered according to the facts proved on the trial, so as to avoid any ambiguity as to the meaning of the plea. If the case remains as it is, each party to pay his own costs. If the plaintiff bring error, and succeed, then he is to have judgment Non obstante veredicto, with twelve pounds damages, and to have all the costs below and in error. If he fail in error, then he is to pay all costs in error."

In the matter of a plaint, SAMUEL FULLER plaintiff, and JAMES HENRY MACKAY, Administrator with the will annexed of CHARLES WHITTLE MACKAY, defendant.

Monday,
June 13th.

QUAINE, in this Term, obtained a rule Nisi to set aside an order of *Crompton J.* for a prohibition in

A. by will bequeathed to his servant *F.*, "should my executors think

proper." 20L, "conditional on his continuing to conduct himself faithfully in all respects," and appointed executors. The will was made in the district of the county court of *K.* and the testator died there. The executors renounced probate; and *M.* took out letters of administration with the will annexed, in the Prerogative Court of the Archbishop of *Canterbury*. *M.* resided in *London*. *F.*, by leave of the judge of the county court of *K.*, sued *M.* in that court for the 20L. On a rule to set aside a judge's order for a prohibition:

Held: that the grant of letters of administration was part of the cause of action, and that the judge of the county court of *K.* had not, under stat. 9 & 10 Vict. c. 95. s. 60., jurisdiction in respect of it over *M.* who was not within his district: and on that ground the rule to set aside the judge's order was discharged.

Whether the bequest, in these terms, was a legacy which might be recovered in the proper county court, under sect. 65, or a bequest in trust, only to be enforced in equity, *quære?* Per Lord Campbell C. J.: *Semble*, that it was a legacy which might be recovered in the proper county court.

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the above plaint, directed to the judge of the county court of *Kent*, holden at *Margate*.

From the affidavits it appeared that the testator made his will at *Margate*, containing, amongst others, this bequest: "likewise, should my executors think proper, to my man servant, whom I call *Sam*" (the plaintiff), "I give 20*L*, conditional on his continuing to conduct himself faithfully in all respects;" and he appointed executors. He died at *Margate*; the executors renounced; and administration with the will annexed was granted in the Prerogative Court of the Archbishop of *Canterbury*. The plaint was to recover this legacy, and was brought by leave of the judge of the county court of *Kent*, holden at *Margate*, against the defendant, who was resident, out of the district of that court, in *London*. The defendant made affidavit that he disputed the plaintiff's right to the legacy, as he conceived that he had a discretion, and did not think fit to pay it (for which he gave reasons).

Field now shewed cause. First, the cause is not one within the jurisdiction of any county court. Stat. 9 & 10 *Vict. c. 95. s. 65.* enacts that the jurisdiction shall extend to the recovery of any demand "which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will." But sect. 58 expressly takes away the jurisdiction where the validity of any "bequest" is disputed. Taking these two together, the statute means to give jurisdiction over simple and undisputed legacies only. [*Erle J.* Was not this point decided in *Pears v. Wilson* (a)? *Crompton J.* In that case, the distinction

(a) 6 *Exch.* 833.

was considered, between an action for a legacy and a suit for the performance of an executory trust: in that case it was held to be a legacy. Is it so here?] It is in this case a bequest of an equitable interest, to be given if the executors think proper. The executors would therefore, if they had taken probate, have been trustees with a personal discretion; and the plaint is in effect an attempt to appoint the administrator trustee in the place of the renouncing trustees, and then compel him to exercise his discretion in a particular way. The Lord Chancellor can do that; but not the judge of the county court. [Lord *Campbell* C. J. That may be the true construction of the Act: but, if it be so, there is a failure of justice in such a case as the present, where the plaintiff is without remedy unless he goes into Chancery for 20*l*.] There is another ground for discharging the rule. The defendant does not reside in the district; and the cause of action did not arise there. The taking out letters of administration is part of the cause of action.

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 Re
FULLER.

Quaine was called upon to answer the last objection. The will speaks from the death; and the letters of administration only prove it. [*Crompton* J. When the cause of action arises after death, there is no cause of action till the letters of administration; *Murray v. The East India Company* (a).]

LORD CAMPBELL C. J. It is not made out that the cause of action arose within the district. If that had been made out, my strong impression is that, this being

(a) 5 B. & Ald. 204.

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a bequest of a legacy, the judge of the proper county court would have had jurisdiction such as a court of equity would have had in a similar case.

COLERIDGE J. I am of the same opinion on the first point. The other is one of considerable difficulty, on which I forbear to express an opinion. But I think it quite clear that the grant of the letters of administration, and the acceptance of them by the defendant, are in this case essential parts of the cause of action.

ERLE J. concurred.

CROMPTON J. The Court should, I think, watch a little strictly the exercise of the power conferred on the judge of the county court, by stat. 9 & 10 *Vict. c. 95. s. 60.*, to give himself jurisdiction. On the other point I shall only say that it is a question of difficulty, on which I have not formed an opinion. The distinction suggested in *Pears v. Wilson* (a) is between a bequest of a legacy, where there is no further trust than the simple one imposed on an executor to pay it, and a bequest in trust. That raises a very nice question, and one which it is difficult to answer.

Rule discharged.

(a) 6 *Exch.* 833.

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Ex parte GEORGE HENRY DAVIDSON.

Monday,
June 13th.

WILLES, in this term, obtained a rule, under stat. 5 & 6 Vict. c. 45. s. 14., calling on *Robert Cocks* to shew cause why three several entries made in the registry, kept at *Stationers' Hall*, under stat. 5 & 6 Vict. c. 45. s. 11., should not be varied or expunged.

By the affidavits it appeared that these entries were: 1st., One (in the form No. 3, in the schedule to that Act) made on 6th *October* 1848, by which it appeared that *Robert Cocks* was the proprietor of the copyright of a musical piece called "*The Lancers' Quadrilles*," first published by himself in *Middlesex*, on 6th *October* 1848: 2. One of 29th *June* 1847, by which *Felix Yaniewicz*, professing to be the author of a musical piece called "*A Polish Rondo*," accepted the benefit of the extension of copyright, under that Act, and declared the copyright to be the property of *Isaac Willis*: 3. A similar entry, on 26th *February* 1853, by which *Ernesto Spagnoletti*, professing to be the author of another musical piece called "*La Dorset*," accepted the extension of copyright under that Act, and declared *Robert Cocks* to be the owner of the copyright. *Davidson* deposed to the effect that an action had been commenced against him by

C. brought an action against *D.* for publishing three pieces of music alleged to be the copyright of *C.* Before the action, three entries had been made in the registry at *Stationers' Hall*, kept under stat. 5 & 6 Vict. c. 45. s. 11. These entries, as they stood, would afford *prima facie* evidence of *C.*'s copyright in the three pieces. *D.* obtained a rule nisi to expunge or vary those entries. It was obtained on an affidavit by which it appeared that *D.* claimed no copyright in the airs himself, but that his case was that they were old pieces, and that the persons who on

the entries professed to be the authors were not really the authors; and the affidavit deposed to information and belief as to facts, which, if true, proved that the pieces were older than the supposed authors. The counsel for *C.* refused to consent not to use these entries on the trial.

The Court declined to expunge the entries, but made an order, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which *C.* should be plaintiff, and on the trial of which the entries should not be used: and that in the mean time proceedings in the action should be stayed.

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Ex parte
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Cocks, who had purchased *Willis's* right to the second air, for publishing these three airs, which *Davidson* had done: *Davidson* did not claim any copyright for himself; but he deposed to his belief that all the three airs were old, that the first was not first published by *Cocks* in 1848, and that neither *Yaniewicz* nor *Spagnoletti* were the authors of the airs which they claimed. The ground suggested for expunging the entries was, that these entries would be *primâ facie* evidence against *Davidson*. He deposed to information and belief that one of these airs was in the original *Beggars' Opera*, and produced, attached to his affidavits, a printed sheet of music containing the third. This sheet had been published in 1817, at a time when, as "he was informed and believed," *Ernesto Spagnoletti* was not ten years old; and the author was said to be his father, a well known composer now dead for many years.

Bovill and *Webster* now shewed cause. The affidavit is only of hearsay. [Lord Campbell C. J. If the fact really be that an old air is now entered in the registry as if newly composed, what can be deposed to except information and belief as to its antiquity?]

Bramwell and *Willes*, in support of the rule, argued that the affidavit furnished sufficient ground for believing that the entries were untrue, and that the use of them at the trial of *Cocks v. Davidson* would be a grievance to *Davidson*. [Lord Campbell C. J. If the entry is expunged, *Cocks* loses his title for ever. The Legislature did not intend that there should be a final decision on the question of property on affidavit.] There is no objection, on *Davidson's* part, to allow the rule to be

enlarged till after the event of the trial, provided *Cocks* will undertake not to use the entries as evidence on the trial. That course was pursued, in *Chappell v. Purday* (a), by consent.

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DAVIDSON.

Bovill, for *Cocks*, refused to give such an undertaking.

LORD CAMPBELL C. J. We are not prepared to expunge these entries; but we think there is enough shewn to justify us in ordering, *proprio vigore*, and without consent, that the rule be enlarged until the trial of an issue, in which *Cocks* shall be plaintiff, and on the trial of which he shall not use these entries as evidence.

ERLE J. and CROMPTON J. concurred.

The following order was made. "That the rule be enlarged until the next Term; and that an issue be tried at the sittings in *London* after this term, in which said issue the said *Robert Cocks* shall be plaintiff, and the said *George Henry Davidson* shall be defendant, and the question to be tried shall be, Whether there was copyright in all, or any, and which, of the pieces of music in question, and whether the said *Robert Cocks* was proprietor of the copyright, in all or any or which of the said pieces of music. And that the entries made at *Stationers' Hall* be not set up at the trial of the said issue. And it is further ordered that the proceedings in the action between the above mentioned parties be stayed unless the said *Robert Cocks* elects within a week not to use the said entries or any of them at the trial."

(a) 12 M. & W. 303.

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Monday.
June 13th.

OLIVER ARNOLD *against* CHARLES JOHN DIMSDALE
and ROBERT WILLIAM GAUSSEN, Esquires.

A. was summoned before justices, under stat. 9 *G.* 4. c. 31. ss. 27., 33., for an assault. He

TRESPASS for assaulting and imprisoning plaintiff for twenty four hours, till he paid 3*l.* 1*s.* 6*d.* Plea: Not Guilty, by statute.

did not appear; and the justices, upon proof of service, heard the case, and convicted *A.*: the conviction was drawn in the form given in sect. 35; and by it *A.* was adjudged to forfeit and pay 2*l.* 10*s.*, and 1*s.* 6*d.* for costs; and, in default of immediate payment, to be imprisoned for six weeks unless the sums should be sooner paid: and the conviction directed that the 2*l.* 10*s.* should be paid to *G.*, one of the overseers of the parish within which the offence was committed, and the 1*s.* 6*d.* to the party aggrieved. And directly thereafter, no payment being made, the justices, in the absence of *A.*, and without further summons, issued a warrant of commitment for default of payment.

Held: that the commitment was legal.

By charter of *Ed.* 4 the Crown granted to the abbot and convent of *S.* the right of appointing their own justices, with power of oyer and terminer for all felonies, trespasses and misdemeanours occurring within the Liberty of *S.*, in the county of *H.*, with a non intromittant clause; and that they might have a gaol, under their own government, without interference by other justices or others, for felons and malefactors taken within the Liberty, till such were delivered by due course of law.

Admitted: that the power to appoint justices was put an end to by stat. 27 *H.* 8. c. 24. (A.D. 1535), and that the justices created by the Liberty under that statute by the Crown had no exclusive jurisdiction over felonies, trespasses and misdemeanours.

Stat. 31 *H.* 8. c. 13. gave the Crown the franchises appertaining to the then dissolved abbeys, or those that should thereafter be dissolved, as largely as the abbots ought to have held the same at the time of their coming to the King's hands. Afterwards, 5th December 1539, the abbey of *S.* was dissolved. Afterwards, by stat. 32 *H.* 8. c. 20. it was enacted that the same liberties, franchises and jurisdictions which the late owners had exercised within three months before the abbeys came to the King's hands should be revived in the King's hands.

Admitted: that these statutes did not revive, in the justices appointed by the Crown for the Liberty, the exclusive jurisdiction given by the charter of *Ed.* 4.

By charter of 9 *Ju.* 1. the Crown granted to *W.* in fee all the Liberty of *S.*, and its rights, as fully as any abbot of the monasteries, or as any king, enjoyed them.

Admitted: that this did not give to the justices of the Liberty exclusive jurisdiction.

Admitted, therefore, and agreed to by this Court: that justices of the county, having by the terms of their commission jurisdiction as well within liberties as without, might, sitting in the county and out of the Liberty, convict under stat. 9 *G.* 4. c. 31. s. 27. for an assault committed within the Liberty.

Within the Liberty was a house of correction, supported exclusively by rates raised in the Liberty. The Liberty did not contribute to the county rate. The keeper was appointed by the justices of the Liberty. Quarter sessions were held within the Liberty at which offences committed within the Liberty were tried.

Held: that justices of the county might, sitting out of the Liberty and in the county, commit a party convicted, under stat. 9 *G.* 4. c. 31. s. 27., of an assault done within the Liberty, to the house of correction of the Liberty.

Whether, if the offence had not been committed within the Liberty, they could have done so by virtue of stat. 27 *G.* 3. c. 11., *quære*.

On the trial, before Lord *Denman* C. J., at the *Hertfordshire* Spring Assizes, 1846, a verdict was found for the plaintiff, subject to a special case; of which the statement, so far as relates to the points here discussed, was as follows.

The two defendants are, and at the several times of the hearing of the charge of assault, and of the conviction, and of the signing by them of the warrant of commitment, hereinafter mentioned, were, two justices of the peace for the county of *Hertford*, and also for the Liberty of *St. Alban's* in the same county. The plaintiff is, and during the whole of the time of the committing of the trespass complained of, and from thence continually hitherto hath been, a resident and inhabitant of the parish of *Wheathamstead* in the county of *Hertford*, which parish is not in the Liberty of *St. Alban's*.

On the 17th of *June* 1845, the plaintiff was summoned to appear, on 21st *June* then instant, at the *Shire Hall* in the town of *Hertford*, in the county of *Hertford*, and out of the Liberty of *St. Alban's*, before the defendants, to answer a charge of assault upon one *William Thredder*, committed in the parish of *Saundridge*, in the Liberty of *St. Alban's*, in the county of *Hertford*. The plaintiff appeared before the defendants at the time and place aforesaid, to answer a charge for another offence committed in the said parish of *Wheathamstead*, which was first heard, and was dismissed: and, immediately afterwards, the plaintiff absented himself, for the express purpose of not appearing according to the exigency of the summons for the said charge of assault. And, upon proof of the due service of such summons on the plaintiff at *Wheathamstead*, the defendants, in the absence of the plaintiff, on the said 21st *June* 1845, at the *Shire Hall*

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 ARNOLD
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1853. aforesaid, and out of the said Liberty of *St. Alban's*,
heard the evidence in support of the said charge, and
then and there, for the assault so committed within the
said Liberty, convicted the plaintiff in a penalty of
2*l.* 10*s.* 0*d.*, and a further sum of 11*s.* 6*d.* for costs:
which fine and costs not having been paid immediately
after such conviction, the defendants, then being such
justices as aforesaid, afterwards on the same day, before
any notice thereof had been given to the plaintiff, or
any demand of such penalty and costs had been made
upon the plaintiff, committed him to prison under a
commitment signed and sealed by each of them, on the
said 21st *June* 1845, at the *Shire Hall* aforesaid, out
of the said Liberty. The proceedings were under stat.
9 *G.* 4. c. 31. ss. 27., 33. The warrant of commitment
is as follows.

“County of *Hertford*, and Liberty of *St. Alban's* in the
said county, to wit. To all constables of the police of
the said county, and to the keeper of the house of
correction at *St. Alban's* in the said county and Liberty.
Whereas *Oliver Arnold*, of the parish of *Wheatthamstead*,
in the said county, sawyer, is convicted by and before
us, *C. J. Dimsdale* and *R. W. Gaussen*, Esquires, two
of Her Majesty's justices of the peace in and for the
said county and Liberty, upon the oath of *W. Thredder*,
for that he, the said *O. Arnold*, did, on the first day of
June instant, at the parish of *Saundridge*, in the county
and Liberty aforesaid, unlawfully assault and beat the
said *William Thredder*, contrary to the form of the
statute in such case made and provided: And there-
upon we, the said justices, adjudged the said *O. Arnold*
to forfeit and pay for his said offence the sum of
2*l.* 10*s.* 0*d.*, and also to pay the sum of 11*s.* 6*d.* for

costs; and we directed that the said sum of 2*l.* 10*s.* 0*d.* should be paid to one of the overseers of the parish of *Saundridge* in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and that the said sum of 11*s.* 6*d.* should be paid to *W. Thredder*, the party aggrieved by the said offence: And whereas the said *O. Arnold* has made default in payment of the said sums: These are therefore to require you, the said constables, to apprehend and forthwith convey the said *O. Arnold* to the said house of correction at *St. Alban's* in the county and Liberty aforesaid, and deliver him to the said keeper thereof, together with this precept. And you the said keeper are hereby commanded to receive the said *O. Arnold* into your custody in the said house of correction, there to be imprisoned for the space of six weeks, unless such sums as aforesaid shall be sooner paid and satisfied: and for your so doing this shall be your sufficient warrant." (Signed and sealed by the two defendants, 21st *June* 1845.)

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Under this commitment, and in obedience to it, the plaintiff was arrested and taken into custody on 25th *June* 1845, at the parish of *Wheathamstead* in the county of *Hertford*, and was taken from thence, in the custody of one of the constables of police for the county of *Hertford*, who also act in the Liberty, to the common gaol at *Saint Alban's* in the Liberty of *Saint Alban's* in the said county, and was there imprisoned until the 26th *June*, the day then next following.

The following conviction was drawn up according to the form of the Act of 9 *G.* 4. c. 31. s. 35., signed and sealed by defendants, and filed amongst the records of the county sessions. A conviction in the same words

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in every respect was signed and sealed by defendants, and filed amongst the records of the Liberty sessions.

"County of *Hertford*, and Liberty of *Alban's* in the said county, to wit. Be it remembered that, on the 21st day of *June* in the year of our Lord 1845, at *Hertford*, in the said county of *Hertford*, *O. Arnold*, of" &c., "is convicted before us, *C. J. Dimsdale* and *R. W. Gaussen*, Esquires, two of Her Majesty's justices of the peace for the said county and Liberty. For that the said *O. Arnold* did, on the first day of *June* instant, in the parish of *Saundridge*, in the said county and Liberty, unlawfully assault" &c. (as in the warrant). "And we, the said justices, adjudge the said *O. Arnold*, for his said offence, to forfeit and pay the sum of 2*l.* 10*s.*, and also to pay the sum of 11*s.* 6*d.* for costs. And, in default of immediate payment of the said sums, to be imprisoned in the house of correction at *Saint Alban's*, in the said county and Liberty, for the space of six weeks, unless the said sums shall be sooner paid. And we direct that the said sum of 2*l.* 10*s.* shall be paid to *William George* of *Saundridge*, one of the overseers of the poor of the said parish of *Saundridge*, in which the said offence was committed, to be by him applied" &c. "And we order that the said sum of 11*s.* 6*d.* for costs shall be paid to *W. T.*, the party aggrieved by the said offence." (Signed and sealed by the two defendants, the day and year first above mentioned.)

On the 21st of *November*, 1845, both the defendants were served with notice of action: and this action was commenced on 23d *December* 1845.

The Liberty of *St. Alban's* was originally created by a charter of *H. 1.* to *Geoffery de Gorham*, the sixteenth abbot. Various privileges were by that and subsequent

charters conferred upon the Liberty of *St. Alban's*, and the Men thereof. And lastly was granted a charter of 2 Ed. 4. to the Abbey and convent of *St. Alban's* (a). The case then set out, in the original Latin, an extract from the charter. It contained a grant to the Abbot and convent, that they and their successors, "infra villas, hundredum et Libertatem prædictam," might appoint their justices to keep the peace, with jurisdiction of oyer and terminer in respect of "omnimodas felonias, transgressiones et malefacta" occurring within the Liberty &c., with a non intromittant clause. And that the Abbot and convent, and their successors, should have a gaol "infra villam de Sancto Albano prædicto, ad felones et alios malefactores quoscunque infra villas, hundredum et Libertatem prædictam captos seu capiendos in eadem gaolâ" "custodiendum" till delivered therefrom by law. "Et quòd senescallus eorundem Abbatis et Conventûs, et successorum suorum, associatis sibi uno vel duobus legis perito vel legis peritis, quorum prædictus senescallus, pro tempore existens, semper sit unus, sint justiciarii nostri et heredum nostrorum ad gaolam illam de prisonariis in eâ existentibus, et eidem prisonæ ex quâcumque causâ committendis, de tempore in tempus deliberandum. Ita quòd nullus justiciarius noster, sive justiciarii nostri, vel heredum nostrorum, ad gaolam illam aliquialiter deliberandum, per nos vel heredes nostros de cætero assignandi, villas, hundredum seu Libertatem prædictam ex hâc causâ, vel alia causâ quâcumque, aliquialiter ingredi-antur seu ingrediatur; et quòd ballivus eorundem Abbatis

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(a) The counsel for the plaintiff, in the present case, having admitted that the county magistrates, as such, had jurisdiction, sitting out of the Liberty, over offences committed within the Liberty, it is not thought necessary to set out this charter more fully. See *Arnold v. Gausson*, 8 *Exch.* 463, where it is more fully given.

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et Conventûs et successorum suorum Libertatis prædictæ pro tempore existens, omnia juratas, panella, inquisitiones, attachiamenta, et intendencias, prefato justiciario ac senescallo, vel duobus eorum ut prædictum est, justiciariis ad gaolam illam deliberandum assignandis de tempore in tempus faciat, retornet et intendat, ac præcepta, mandata, waranta et judicia eorundem justiciarii et senescalli, vel duorum eorum, pro tempore existentium ut prædictum est, faciat et exequatur, in omnibus eisdem modo et formâ prout aliquis vicecomes regni nostri Angliæ hujusmodi justiciariis ad gaolas ejusdem regni nostri deliberandum assignatis facit, retornat, intendit et exequitur quovis modo.”

The case then set out parts of stat. 27 *H. 8. c. 24.* (A.D. 1535.), “For recontinuing liberties in the Crown” (a):

(a) The following are the most material. Sect. 2 enacts “that no person or persons, of what estate, degree or condition soever they be, from” 1st July 1536, “shall have any power or authority to make any justices of eyre, justices of assize, justices of peace, or justices of gaol delivery; but that all such officers and ministers shall be made by letters patents under the King’s great seal, in the name and by authority of the King’s Highness and His heirs, kings of this realm, in all shires, counties, counties palatine, and other places of this realm,” &c., “at their pleasure and wills, in such manner and form as justices of eyre, justices of assize, justices of peace, and justices of gaol delivery, be commonly made in every shire of this realm; any grants, usages, prescriptions, allowances, Act or Acts of Parliament, or any other thing or things to the contrary thereof notwithstanding.”

Sect. 17. “Provided always, That all and singular justices of the peace, gaol delivery and assize, hereafter to be made, named and appointed by the King’s Highness, His heirs and successors, within any Liberty, where any such justice of peace, gaol delivery or assize, or any of them, have been made by any person or persons by virtue or authority of any letters patents of the gift or grant of our Sovereign Lord the King, or His most noble progenitors, kings of this realm, or otherwise, shall sit and keep their sessions, gaol delivery, and assizes, only in such place and places as the justices of the said Liberties lately have commonly used within the said Liberties. And that no person or persons within the said Liberties, or any

and of stat. 31 *H. 8. c. 13.*, "For dissolution of monasteries and abbeys" (*a*).

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of them, shall be hereafter in any wise compelled by authority of this Act to appear out of the said Liberties before any other justices of assize, gaol delivery, or of the peace than before such justices as shall be named and assigned to sit and be by the King's Highness, His heirs and successors, within the said Liberties in form aforesaid."

(*a*) Sect. 1 recites that divers abbots, priors and other ecclesiastical governors of divers monasteries, abbaties, &c. within the realm, of their own free and voluntary minds, since 4th *February 27 H. 8.*, had severally granted and confirmed all their said monasteries, abbaties, &c., and all their sites, &c., liberties, privileges and franchises &c., appertaining or in any wise belonging to any such monastery, abbath, &c., to the King, His heirs and successors,

Sect. 2 enacts that the King "shall have, hold, possess and enjoy to Him, His heirs and successors for ever, all and singular such late monasteries, abbaties," &c. "which sith the said 4th day of *February*" "have been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to His Highness;" "and in like manner shall have, hold, possess and enjoy all the sites," &c., "leets, courts, liberties, privileges, franchises and other whatsoever hereditaments, which appertained or belonged to the said late monasteries, abbaties," &c., "or to any of them, in as large and ample manner and form, as the late abbots, priors," "and other ecclesiastical governors and governesses of such late monasteries, abbaties," &c., "had, held or occupied, or of right ought to have had, holden or occupied, in the rights of their said late monasteries, abbaties," &c., "at the time of the said dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or by any other manner of mean coming of the same to the King's Highness sithen the 4th day of *February* above specified."

Sect. 3 enacts "that not only all the said late monasteries, abbaties, &c., "but also all other monasteries, abbaties," &c., "which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to the King's Highness; and also all the sites," &c., "leets, courts, liberties, privileges, franchises and other hereditaments whatsoever they be, belonging or appertaining to the same or any of them; whensoever and as soon as they shall be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come unto the King's Highness, shall be vested, deemed and adjudged" "in the very actual and real seisin and possession of the King our Sovereign Lord, His heirs and successors for ever, in the state and condition as they now be."

Sect. 4 enacts, that the monasteries, abbaties, &c., dissolved or coming

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At the time of passing the last mentioned statute, the monastery of *St. Alban's* had not been by any means dissolved; but, on 5th *December* 1539, after the passing of the last mentioned Act, the said monastery was in due form surrendered into the hands of the King.

The case then set out parts of stat. 32 *H. 8. c. 20.* (A.D. 1540), "Concerning privileges and franchises" (*a*).

to the King, or which should thereafter be dissolved or come to the King, and all the leets &c. (as before), except those coming by attainder of treason, should be in the order, survey and governance of the King's Court of Augmentations.

(*a*) The following are the sections mainly bearing upon the points. Sect. 1 recites that divers sites &c. of later monasteries, abbaties, &c. had by divers "statutes heretofore made, been assigned, limited and appointed to the order, rule, survey, and governance of the Court" "of Augmentations" &c., "by the which statutes it is not fully, plainly nor expressly declared or rehearsed, how and in what wise and by what special officers and ministers, the liberties, privileges and franchises, which the late owners of the same sites," &c., "had, used and exercised, should, be ordered, used, exercised and put in execution:" and enacts "that all and singular the same liberties, franchises, privileges and temporal jurisdictions, which the said late owners had, used and exercised lawfully, by themselves, or by their officers or ministers, or might have used and exercised lawfully, by themselves, or by their officers or ministers, or might have used or exercised, within three months next before that the said sites," &c., "came to the possession of the King's Highness, shall be by virtue of this present Act revived, and be really and actually in the King's Highness, His heirs and successors, and shall be in the rule, order, survey and governance of the King's said Court of Augmentations" &c.: "and that the same liberties, franchises, privileges, and temporal jurisdictions, and all manner fines, issues, amerciements, and other profits and commodities, of what kinds or natures soever they be, coming, growing or rising by reason or occasion of them, or any of them, shall be used, exercised and occupied to all intents, purposes, conditions and respects, and shall be claimed, levied, collected and taken by such stewards, bailiffs, and other officers and ministers, as shall please the King's Highness to name and appoint, in like manner, form, fashion and condition as they or any of them were lawfully used, exercised, executed, claimed, levied, collected and taken, before that they came to the hands and possession of our said Sovereign Lord; and that the same stewards, bailiffs, officers and ministers, shall be accountant for the

By letters patent, tested 27th April 9 Ja. 1., James I. granted to *George Whitmore* and *Thomas Whitmore*, of *London*, Esquires, their heirs and assigns for ever, (inter alia) All that Our hundred of *C.*, with all and singular its rights, members, liberties and appurtenances whatsoever arising, increasing, renewing, happening or belonging in or within the Liberty of *Saint Alban* in the county of *Hertford*; and the office of hundredor there, with the appurtenances; and also all that Our Liberty to the late monastery of *Saint Alban* appertaining, relating, incident or belonging, in our counties of *Hertford*, *Bedford* and *Buckingham*, or any of them; with all and singular its rights, members and appurtenances whatsoever, as and so fully, freely and perfectly, and in so ample a manner and form, as any abbot or prior, &c., of any late monastery, abbey or priory &c., or any other or others, at any time theretofore having, possessing or

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issues and revenues of their bailiwicks and offices, and shall be compelled to account in the said Court of Augmentations, like as the King's receivers or other officers accomptants in the said Court heretofore have done or ought to do."

Sect. 3 enacts: "That the said stewards, bailiffs and other officers and ministers, shall be attendant and obedient to all other the King's Courts, as well for all executions and returns of writs, warrants and precepts, as for their personal appearances, and other duties of their offices, like as the officers and ministers of the said late owners did and ought to do, or should have done by reason of their said several offices, before that the same liberties, privileges and temporal jurisdictions did come to the possession of our said Sovereign Lord, and that to be done and observed upon all pains and penalties by the laws of this realm limited and ordained for any offence or default of the same: and that no sheriff, under sheriff, nor other officer or minister, of any sheriff or other foreign officer or minister, shall in any wise intromit or meddle in, with or upon any of the premises, otherwise or in any other manner, nor for any other cause, than they or any of them lawfully might have done before the same premises did come to the possession of our said Sovereign Lord."

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seised of the aforesaid hundreds, liberties, &c., and other the premises, with their appurtenances, or any part thereof, ever had, held, used or enjoyed, or ought to have had, held, used or enjoyed, in or within the aforesaid hundreds, liberties, &c., and other the premises by the said letters patent granted, or in or within any part thereof, by reason or pretext of any charter, gift, grant or confirmation, or any letters patent by Us, or any of Our progenitors or predecessors, late kings or queens of *England*, theretofore had, done or granted or confirmed, or by reason or pretext of any Act or Acts of Parliament; and so fully, freely and perfectly, and in so ample a manner and form, as We, or any of Our progenitors or predecessors, late kings or queens of *England*, the aforesaid hundreds, liberties and other the premises, or any part or parcel thereof, had and enjoyed, or ought to have had and enjoyed.

All and singular the premises comprised in the said letters patent of 9 *Ja.* 1. were, shortly after the teste thereof, conveyed by the said *G. Whitmore* and *T. Whitmore* to *Robert*, the then Earl of *Salisbury*: and from him they have descended to the present Marquis of *Salisbury*; who, under the authority given him by the said grant, does the several acts, and performs the duties, and exercises the several privileges, hereinafter mentioned.

There are, and long before 17th *June* 1845 there were, and always since that time have been, separate and distinct commissions of the peace for the county of *Hertford* and for the Liberty of *Saint Alban*. The justices appointed under the county commission, during all the time last aforesaid, were authorized generally to keep the peace in the said county of *Hertford*: and the

commission contains these words: "as well within Liberties as without." And those appointed under the Liberty commission were authorized generally to keep the peace within the Liberty. There are, and during all the time last aforesaid there were, appointed exclusively for the Liberty of *Saint Alban* a custos rotulorum and clerk of the peace. But the coroner is not distinct, the county coroner acting in the Liberty: but all inquests in the Liberty are paid for out of the Liberty rates. And quarter sessions of the peace were, during all the time last aforesaid, regularly held at *Saint Alban's* in and for the Liberty; at which appeals against orders, &c., of the Liberty justices were heard and determined, and at which prisoners committed for trial, or held to bail, by the Liberty justices, for felonies and misdemeanours &c. committed within the said Liberty were indicted and tried. And the jurors who were empannelled at such quarter sessions were summoned by the Marquis of *Salisbury*, by virtue of his office of hundredor, solely from within the limits of the said Liberty, and under different qualifications from jurors for the county.

The Liberty, during all the time last aforesaid, claims to have had a gaol delivery belonging to itself, in addition to its quarter sessions.

A separate and distinct rate, in the nature of a county rate, during all the time last aforesaid, has for all purposes been made and levied within the Liberty of *Saint Alban's*: and no part of the Liberty has, during any part of the time last aforesaid, in any way contributed towards the county rate for the county of *Hertford*; which, during all that time, has been raised entirely from such part of the county of *Hertford* as is not within the limits of the Liberty.

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The Liberty denies its liability for the maintenance of prisoners confined in the county gaol for Liberty offences triable at the Assizes, either before or after trial. But, by arrangement and under protest, they have, for a few years past, paid out of the Liberty rate those expenses, as well as the expenses of prosecuting such offenders.

By stat. 2 & 3 *Vict. c. 93.*, "For the establishment of county and district constables by the authority of justices of the peace," no mention is made of Liberties : and the justices for the county of *Hertford* were unable to apply the provisions of that Act in the parishes within the Liberty of *Saint Alban's* until the passing of stat. 3 & 4 *Vict. c. 88.*, "To amend the Act for the establishment of county and district constables," which, by sect. 3, authorizes the justices of counties to make a county police rate, and to include therein all liberties and franchises which are locally situate within such counties. And one police rate is, under the last mentioned statute, now made over the parishes both within the county and Liberty. And the justices acting under the Liberty commission have, during all the time last aforesaid, had and exercised the entire and sole controul over the funds levied from the said Liberty rate.

The house of correction at *Saint Alban's*, mentioned in the warrant of commitment, and in which the plaintiff was imprisoned, is not used as a gaol or house of correction for the whole county of *Hertford*. It is entirely supported and maintained out of the rates raised in and for the purposes of the said Liberty, as hereinbefore mentioned. And the keeper of the said house of correction acts under the appointment of the justices of the said Liberty, but is always the same person as is, in the

first instance, appointed by the Marquis of *Salisbury*, by virtue of his office of hundredor, to be keeper of the gaol; which is part of the same building as the house of correction.

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The case then contained certain entries from the records of the county sessions; upon which, however, no stress was laid in the argument or judgments.

The Court were to be at liberty to draw any inference of fact which a jury might have drawn. The question for the opinion of the Court was stated to be:

Whether, under the circumstances above set forth, the plaintiff is entitled to recover in this action against the defendants (with provisions for entering a judgment or a nonsuit accordingly).

The case was argued in this Term (a).

Willes, for the plaintiff. The case raises three questions. The first is: Whether the defendants, sitting in the county of *Hertfordshire* but out of the Liberty of *St. Alban's*, had jurisdiction to convict of an assault committed within the Liberty. This point has been decided by the Court of Exchequer in the affirmative, on the ground that the exclusive jurisdiction given to the justices of the Liberty by the charter of *Ed. 4.* was put an end to by stat. 27 *H. 8. c. 24. s. 2.*, and had not been revived; and that the commission of the county justices gives them authority to act within the Liberty as well as without; *Arnold v. Gaussen* (b). The plaintiff does not now impeach the correctness of that decision. [*The Court* intimated that they took the same view.]

(a) *May* 31st 1853. Before Lord Campbell C. J., Coleridge and Crompton Js.

(b) 8 *Exch.* 463.

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The second question is: Whether the defendants, sitting in the county, had power to commit to the house of correction which belongs to, and is in, the Liberty. That point also was decided in the affirmative in *Arnold v. Gausson* (a): but the plaintiff wishes to have the decision reconsidered in this Court, there having been no means of taking the opinion of a Court of Error. The Court of Exchequer appears to have considered that, under stat. 27 *G. 3. c. 11.*, any justice has power to commit persons convicted of small offences (which would include a conviction under stat. 9 *G. 4. c. 31.*) to any house of correction within his jurisdiction. The decision, therefore, if correct, is applicable to justices who are not justices of the Liberty but only of the county, and to offences committed out of the Liberty but in the county. The Liberty has a distinct commission for justices of the peace, a separate *custos rotulorum*, a separate quarter sessions, and a separate county rate out of which the house of correction is maintained. The expense of maintaining all prisoners committed for small offences, throughout the county, might thus be thrown on the Liberty. But the object of stat. 27 *G. 3. c. 11.* was, not to enlarge the power of the justice as to the place to which he might commit, but to enable him to apply the provisions of stat. 6 *G. 1. c. 19.* to convictions under any law passed, or to be passed, after the passing of the Act last mentioned. Stat. 6 *G. 1. c. 19. s. 2.* recites that offenders charged with small offences, and certain others, could not be committed for safe custody to any other prison than the county gaol; and then enacts: "That it shall and may be lawful to and for the justices of the peace within their respective jurisdictions,

(a) 8 *Exch.* 463.

to commit such "offenders" "either to the common gaol or house of correction, as they in their judgment shall think proper." That clearly refers only to the common gaol or house of correction of the county &c. for which the justice is acting, and in respect of which he is exercising jurisdiction. Then stat. 27 G. 3. c. 11. recites that "doubts have arisen, whether such of the provisions, contained" in the last mentioned Act, "as give a discretionary power to justices of the peace, in their respective jurisdictions, to commit" "offenders" "charged with small offences, either to the common gaol or house of correction, extend to offences committed against the provisions contained in Acts of Parliament made since the passing of the said recited Act, where such offenders are ordered to be committed to the common gaol;" and that "it may be proper to extend the provisions of the said Act:" and it enacts: "That it shall be lawful for any justice or justices of the peace, within his or their respective jurisdictions, to commit either to the common gaol, or to any house of correction, within his or their respective jurisdictions, as to such justice or justices shall seem most proper, such" "offenders" "charged with or convicted of small offences, as by any law now in force, or hereafter to be made, he or they is or are, or shall be authorized to commit to the common gaol." This extends the power of commitment under the earlier Act to other offences, but does not alter the place of confinement. That must still be the gaol or house of correction of the jurisdiction for which the justice is acting: here the jurisdiction was that of the county, as the justices were not sitting in the Liberty. [Lord Campbell C. J. At common law the sheriff was bound to keep his prisoners

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1853. in arctâ custodiâ: I do not know that this must have
 ARNOLD been in the common gaol.] The right to use a prison
 v. must be limited to the district which contributes to its
 DIMSDALE. maintenance: that principle appears in *Rex v. Amos* (a);
 which case shews also that a right of the justices of one
 jurisdiction to use a prison within another jurisdiction
 must be given by statute.

The third question is, whether, assuming the jurisdiction and the right to commit to the house of correction of the Liberty, this particular conviction and committal can be supported. The conviction adjudges the prisoner, "in default of immediate payment of the said sums, to be imprisoned:" and one of the sums, 2*l.* 10*s.*, is ordered to be paid to the overseer of *Saundridge*; the other, 1*l.* 6*d.*, to the party aggrieved. Some time ought to be allowed for the payment: at any rate the offender should be reasonably enabled to find the overseer, before he is imprisoned as for default of payment. [Lord *Campbell* C. J. Is it not a matter for the discretion of the justices? If the overseer be not present, or easily accessible, they probably will allow time.] If time had been allowed, it should seem, from *Kinning v. Buchanan* (b) and the authorities there cited, that a distinct hearing ought to have been granted to the offender before the warrant of committal issued: by the order for immediate payment, this advantage is lost. [*Crompton* J. Stat. 9 *G.* 4. c. 31. s. 35. gives this very form of conviction.] If the fine, as is the case under some Acts of Parliament, were payable to the clerk of the justices, the objection would not arise. The conviction may possibly be good under this Act, as impliedly

(a) 2 *B. & Ald.* 533.(b) 8 *Com. B.* 271.

allowing reasonable time. *Thompson v. Gibson* (a) rather seems to support this construction; and other authorities are cited in *Wise's General Index to Meeson and Welsby's Reports*, 136, COSTS, II., in a note upon *Thompson v. Gibson* (a). But, if that be the proper construction, there should have been a new summons before the commitment; and the case shews that the plaintiff, though he had been summoned before the conviction, was not summoned afterwards: but that the commitment issued in his absence. Undoubtedly, different constructions have, in the case of different statutes or instruments, been applied to words of this kind. "Instantly" has been held not a good allegation of time in a coroner's inquest; *Regina v. Brownlow* (b).

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Channell Serjt., *contra*. The decision of the Court of Exchequer in *Arnold v. Gaussen* (c) on the second point, as well as on the first, is correct. It is not likely that the Court overlooked, as seems to be suggested, the connection of stat. 27 G. 3. c. 11. with stat. 6 G. 1. c. 19. There is a distinction between the questions, What county justices have jurisdiction to do in a franchise within the county, and, What justices of the franchise can do in the county without the franchise. *Rex v. Amos* (d) was a case relating to the latter question: the present relates to the former. In *Rex v. Amos* (d) the language of *Bayley J.* was: "As the borough magistrates have no exclusive jurisdiction, the offences within the borough, generally speaking, are county offences; the offenders may be committed, *ad libitum*, either to the borough

(a) 8 M. & W. 281. See *Grace v. Clinch*, 4 Q. B. 606.

(b) 11 A. & E. 119.

(c) 8 Exch. 463.

(d) 2 B. & Ald. 533.

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house of correction, whilst there was one, or to the county house of correction ; and they may be tried, ad libitum, either at the borough sessions, or at the county sessions. They are county offenders, and, if not tried at the borough sessions, must, at probably a heavy expense to the county, be tried at the county sessions." It is clear that the learned Judge would have held that the county justices, having jurisdiction within the borough of *Liverpool*, might commit to the house of correction in *Liverpool*, and ought to do so in the case of an offence committed within the borough. This power they would have at common law : though it is true that, as has been said on the other side, the justices of the franchise could not commit to a prison without the franchise unless they were empowered by statute to do so. Here, therefore, the defendants had power to commit to a prison within the Liberty, by common law. The only question would be whether they could use the house of correction for such a prison. That they are empowered to do by stat. 6 G. 1. c. 19. and 27 G. 3. c. 11. As against the county justices, the Liberty is no franchise at all : that follows from the decision in *Arnold v. Gaussen* (a), which is not disputed. [Crompton J. Is the officer of a private gaol a servant of the county ?] Whatever difficulty there might be as to the gaol of a Liberty, there is no franchise as to the house of correction. It is not important that here the same officer has the care of the two. Whether even the gaol of the Liberty is a legal gaol or not may perhaps be questionable.

As to the last question. The word "immediately" may, in some instances, mean with convenient speed.

(a) 8 Exch. 463.

But in a conviction on this statute it can mean only at the time of the conviction for payment. Time may be allowed under sect. 27 of stat. 9 *G. 4. c. 31*; but here no time is allowed. In *Ely v. Moule* (a) a debtor summoned before a county court, under stat. 9 & 10 *Vict. c. 95.*, failed to appear; and the judge made a verbal order that he should pay the debt and costs "forthwith." It was held that the defendant was, by his default, in the same situation as if he were present; that the order was in the nature of a judgment; and that, payment not being made forthwith, his goods were liable to execution without further notice to him. That applies to the present proceeding *ex parte* under stat. 9 *G. 4. c. 32. s. 33.* In *Kinning v. Buchanan* (b) the issuing of the warrant in question was a distinct proceeding: there had been an order for payment by instalments: and the warrant issued upon a default in the payment of an instalment. But here the adjudication is that the party pay forthwith or be imprisoned: the imprisonment is simply an execution of that adjudication. [*Coleridge J.* Suppose the overseer lived twenty miles off.] Probably in such a case the magistrates would allow time for payment; or a payment to the magistrate's clerk might suffice. [*Lord Campbell C. J.* The fine is a fine to the Queen, though payable to the overseers.] The conviction follows the form in sect. 35 of stat. 9 *G. 4. c. 31.*; and, by sect. 36, the warrant cannot be held void, it being alleged therein that the party has been convicted.

Willes, in reply. As to the second point: the law as

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(a) 5 *Exch.* 918.

(b) 8 *Com. B.* 271

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to houses of correction may be collected from 3 *Steph. Comm.* 207 (ed. 2.), Book IV. Part III. ch. 5. The author describes them as "a species of gaol which does not fall under the sheriff's charge; but is governed by a keeper wholly independent of that officer." They seem, he says, to have been first established in the reign of *Elizabeth*, and were originally designed for penal confinement of paupers and vagrants: and he points out that generally, in other cases, the only legal place of commitment was the common gaol of the county &c. in which the offence was triable: he then refers to stat. 6 *G.* 1. c. 19., which has already been discussed. Under stat. 4 *G.* 4. c. 64. ss. 8., 9., justices of a county could not commit to the house of correction of a borough. [Lord Campbell C. J. May there not be a distinction between a borough and a Liberty?] The only distinction is between those jurisdictions which have quarter sessions of their own, and those which have not.

As to the third point: the question is not one of form but substance. The party has been convicted and committed *uno flatu*, without an opportunity of performing the alternative of payment. *Hammond v. Bendyshe* (a) is to the same effect as *Kinning v. Buchanan* (b).

LORD CAMPBELL C. J. It is conceded that the judgment of the Court of Exchequer on the first point, in *Arnold v. Gausson* (c), cannot be impeached.

As to the second point: the Court of Exchequer has also given a decision. We are not absolutely bound by that, inasmuch as this is a Court of coordinate jurisdic-

(a) 13 *Q. B.* 869.(b) 8 *Com. B.* 271.(c) 8 *Exch.* 463.

tion: and, as we are called upon to reconsider the question, we will do so: and for that we will take time.

As to the third point: we are now prepared to say that the defendants are entitled to our judgment. The question is, whether, after the conviction, there ought to have been a distinct summons of the plaintiff before he was committed. We are of opinion that this was wholly unnecessary. Stat. 9 G. 4. c. 31. s. 27. seems to me to shew clearly that, upon a conviction for an assault under this statute, there may be an immediate commitment. I agree that, in some statutes, "immediate" may mean as soon as convenient. But let us see what the meaning is here. Sect. 27 empowers the justices to commit if the fine and costs "shall not be paid, either immediately after the conviction, or within such period as the justices shall at the time of the conviction appoint." Here the conviction orders immediate payment: and the Legislature clearly meant that, in that case, there should be immediate commitment on default of payment. It is as if the justices had said that they gave *no* time. Then the commitment is properly made, there being default of such immediate payment. It is argued that the overseers, to whom the payment is to be made, may be absent. I am rather inclined to adopt my brother *Channell's* suggestion, that the payment need not be made by the party convicted to the overseer, but may be made to the justices' clerk. At any rate, if that be not so, we must presume that the magistrates would give reasonable time for payment, if necessary. They have done otherwise: and we must presume that they have done rightly.

COLERIDGE J. I am of the same opinion. Whether the magistrates have exercised their discretion wisely, is

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not the question before us: the question is, whether they had jurisdiction to do what they have done. Sect. 27 of stat. 9 G. 4. c. 31. gives them power to order payment immediately or in such time as they may appoint: it makes no distinction between the cases where the party is present and where he is absent: it was probably the intention to give the justices a discretion. It might sometimes not be safe to allow time for payment; cases might well be where, if that were done, there would be no payment at all. Here the justices have ordered immediate payment; that must mean "directly." If not, we should be holding that the word "immediate" necessarily means "within some limited time" (a).

As to the second point: *Cur. adv. vult.*

LORD CAMPBELL C. J. now delivered the judgment of the Court.

The question in this case, on which we desired to take time before we answered it, was this: whether, in the case of an offence committed within the Liberty of *St. Alban's*, justices of the peace for the county of *Hertford*, sitting in the county and without the Liberty, have the power to commit to the house of correction within the Liberty. The defendants are justices of the peace for the county; and the commission under which they act extends within Liberties, as well as without; the house of correction is not used as such, or as a gaol, for the whole county, but only for offenders within the Liberty: it is entirely supported out of the rates raised in the nature of county rates within, and for the purposes of, the Liberty; and the keeper is appointed by the justices

(a) *Erle J.* was absent. *Crompton J.* had left the Court towards the close of the argument.

of the Liberty, who act under a separate commission from that of the county, but not with exclusive jurisdiction. No part of the Liberty contributes at all to the general county rate.

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The Court of Exchequer have recently decided this very point in the case of *Arnold v. Gausson* (a). That case, as well as the present, involved other points; in the decision of which by that Court we expressed our concurrence at the time of the argument. Upon the one now to be decided, we entertained some doubt, and have now to consider it. Upon the facts above stated, it is clear that the defendants had jurisdiction over the offence and the offender; and, although they were sitting out of the Liberty, yet, as the offence was committed within the Liberty, it was clearly proper to commit to the Liberty house of correction if by law they might so do. The only question, therefore, is whether the defendants had jurisdiction to that extent.

The Court of Exchequer, in answering that question affirmatively, seem to have relied mainly on the words of stat. 27 G. 3. c. 11., which certainly extend very far: but we rather think that Mr. *Willes* successfully explained them by reference to the preceding statute of 6 G. 1. c. 19.; and we should hesitate to rest our judgment upon them.

It appears to us, however, that, as the defendants are in effect justices of the Liberty as well as of the county at large, as in the former character they might certainly have made this committal if they had been sitting within the Liberty, and in that case ought to have made it, and that the keeper of the Liberty house of correction would,

(a) 8 *Exch.* 463.

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for that purpose, have been their officer, though not appointed by them, the mere circumstance that they were sitting out of the Liberty cannot make their act excessive in point of jurisdiction. If there were two commissions, each exclusive of the other, and the defendants were in both, they must certainly, except in cases provided for by certain Acts to which we need not now advert, have acted in respect of each only within the limits of each. Generally speaking, therefore, a committal to the Liberty prison must have been made by a justice sitting within the Liberty. But the defendants, although they have jurisdiction within the Liberty, have it in virtue of the same one and entire commission, which embraces both Liberty and county at large. To them there is no distinction between the two. Wherever, therefore, they are in either, they may act indifferently for both. We think, therefore, that the defendants are entitled to our judgment. But it may be right to observe that this will be no authority for the committal to the Liberty prison of an offender for an act done out of the Liberty. In determining that question, should it arise, other considerations would be imported than those merely of the general jurisdiction of the magistrates. As the county at large is not contributory to the Liberty rate, by which the Liberty prison is supported, according to a well established principle, the prisoners of the county ought not to be made a burthen to the Liberty.

We add this only by way of caution. But, for the reasons assigned, our judgment in the present case is for the defendants.

Judgment for defendants.

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WESTOBY *against* DAY.Monday,
June 13th.

DECLARATION for money due from defendant to plaintiff on a writing obligatory, dated 6th *May* 1852, by which defendant acknowledged himself to be bound to plaintiff in 1600*l.*, conditioned for repayment by defendant to plaintiff, with interest, of 800*l.*, lent by defendant to plaintiff, and payable by instalments; that is to say, 200*l.* and 48*l.* for interest, on 1st *January* 1853 (the rest by three other instalments, at days named). Breach: Non payment of the 248*l.* on 1st *January* 1853, or since.

Plea: That the City of *London* now is, and immemorially hath been, an ancient city: and that there is, and immemorially hath been, a custom therein &c. The plea then set out the custom of foreign attachment, substantially to the effect following. That, if any person affirms a plaint in debt in the court of Her Majesty holden before the Mayor and aldermen of the said city, in the chamber of the *Guildhall*, and, upon such plaint, it be commanded by the court to any serjeant at mace, &c., to summon such defendant to appear in the same court to answer the plaintiff; and if it is returned, by such serjeant, &c., that defendant has nothing within the city or liberties whereby he can be summoned, nor is to be found within the city; and such defendant, at that court, being solemnly called, makes default; and in the same court it is alleged by plaintiff that any other person

In an action of debt by *W.* against *D.*, *D.* pleaded that the debt had been attached in the hands of *D.* as garnishee in a plaint of debt in the court of the Mayor and aldermen of the city of *London* by *C.* against *W.* Replication: that the alleged debt sued for in the Mayor's court did not arise or accrue within the jurisdiction of that court, nor had that court had at any time jurisdiction thereof.

Held, on demurrer, a bad replication.

The custom of foreign attachment in the said court does not apply to debts, the beneficial interest of which is vested in a person other than the defendant sued in such court, whereof the garnishee has notice; and

such debts are not attachable under the custom.

So certified by that court through the Recorder, and held a good custom by this Court upon demurrer.

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owes, or has owed, to defendant any sum of money amounting to the debt in such plaint specified, or any part thereof: then, at the petition of such plaintiff for process according to the custom (that is to say; that such person, so owing or having owed such debt, whether the same be then payable or to become payable at a day to come, being found within the jurisdiction of the court, may be warned by the serjeant, &c., not to part with such debt or sum of money without the license of the court, but the same in his hands and custody safely to keep, so that defendant may be attached thereby, that he may appear in court to answer plaintiff in the plea in such plaint specified), it is commanded by the court to the serjeant, &c., to attach such defendant, in such plaint, by such sum of money, so being in the hands &c., according to the said custom, so that such defendant may appear at the then next court to be holden before the said Mayor and aldermen, to answer the plaintiff; and then, if such serjeant, &c., return such defendant to be attached according to the said custom, by such sum to be defended and kept, so that such defendant may appear at the then next court to answer such plaintiff in the plea in such plaint specified, and if the defendant, at that and three other courts then next, severally holden before the Mayor and aldermen, being solemnly called, does not appear, but makes default; and such four defaults, according to the custom, are recorded against such defendant, at such four courts after such attachment made, and if such plaintiff, at every of such four courts, appear according to the custom: then, at the last of the said four courts, or at any court holden after such four defaults recorded, at the petition of plaintiff, it is used for the court to command

any serjeant at mace, &c., to warn such other person, so being found within the city, according to the custom, to appear at any court afterwards holden, to shew if anything he has to say for himself why such plaintiff ought not to have execution of such sum so attached; and, if at such court such serjeant, &c., return such other person to be warned according to such custom to appear in the same court to shew such cause, and if such person, so warned, duly appear in the same court, and at the same court, or some other court, comes and says that, at the time of making such attachment or at any time since, he had not owed to or detained from, nor did he then owe to or detain from, the defendant named in such plaint the said money so alleged to be in the hands &c., and attached, or any part thereof, and if issue has been joined between the parties upon such plea, and the jurors, &c., say that, at the time of making such attachment, or at some time since the making of the same, and before the pleading of such plea, such other person had owed to and detained, and at the time of such plea owed to and detained, from the defendant the said sum of money so alleged to be in the hands &c., or some part thereof, and so attached &c., as the proper moneys of the defendant named in the plaint, then it is, and from time immemorial it has been, used and accustomed for such court to award such plaintiff to have execution of such sum of money as such other person has by such jurors been so found to have owed to and detained, and to owe to and detain from the defendant, by sufficient pledges to be found and given by such plaintiff, in such plaint named, in the same court, according to such custom, to restore to such defendant such last mentioned sum of money so attached if such

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defendant, within a year and a day then next ensuing, come or has come into the court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom; and that, after such pledges found, and execution had of such sum as such other person has by such jurors been so found to owe &c., such other person is discharged against such defendant of the sum so attached and had in execution, and such defendant is discharged against the plaintiff of so much of his debt, in such plaint demanded, so long as such judgment and execution remain in force and effect: and, if such sum of money, so attached and defended and had in execution, amount not to the whole debt demanded by plaintiff against defendant, then plaintiff to have process against defendant for the residue. Averment: That *F. W. Caldwell, H. C. Chilton* and *F. J. Fuller*, before 1st *January* 1853, to wit 22d *July* 1852, came into court before the Mayor and aldermen, &c., according to such custom, and affirmed a plaint against the now plaintiff in a plea of debt. The plea then set out very fully the proceedings in the Mayor's court, &c., the order to summon plaintiff to appear, and the return that plaintiff had nothing within the city or the liberties whereby he could be summoned, nor was he to be found within the same; that plaintiff, solemnly called, made default; that it was alleged that *Day*, the now defendant, owed to the now plaintiff 280*l.* in moneys numbered, as the proper moneys of the now plaintiff, and then had and detained the same in his hands and custody. Averment: that the now defendant, at the time, was and was found within the city and the jurisdiction of the court. That the court commanded to attach the now plaintiff by the

said 280*l.*, and keep &c.; that defendant, being found within the city and the jurisdiction, was duly warned, according to the custom, not to part with the 280*l.* without the license of the court &c., so that the now plaintiff might be attached thereby that he might appear at the then next court, to answer &c.: that thereupon the serjeant attached the now plaintiff, by the said sum of 280*l.* That, afterwards, the serjeant returned that he had attached &c. the now plaintiff by the said sum of 280*l.* &c.; that the now plaintiff, being solemnly called, made four defaults, the plaintiffs appearing; which defaults were recorded; that it was commanded by the court to the serjeant that he should warn and make known to the now defendant, being the garnishee, &c., to appear &c. That the now defendant was, &c., warned by the serjeant &c. That, at the court holden on 11th *January* 1853, &c., the serjeant returned that he had warned &c. That the now defendant, the garnishee, appeared, and imparled, and, at the next court, for a plea, said that, at the time of making the attachment, or at any time since, he had not owed to or detained from, nor did he then owe to or detain from, the now plaintiff the debt named in the said plaint, the said 280*l.*, or any part thereof, and put himself upon the country; and plaintiffs did the like. Averments of continuance of process, summoning of jury, and verdict, That, as to 248*l.*, parcel of the said 280*l.* in moneys numbered, as above mentioned to be attached, on 1st *January* 1853, the said garnishee had owed to and detained from, and then still owed to and detained from, the said defendant, named in the bill and attachment, the said 248*l.*, as the proper moneys of the said defendant. And thereupon

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it was considered by the court that *F. W. Caldwell, &c.*, should have execution of the said 248*l.*, in moneys numbered, so attached: and that they should retain and hold the same in full satisfaction of the like sum of 248*l.*, parcel of the debt in the plaint mentioned, by sufficient pledges &c., to restore to the now plaintiff the said 248*l.*, so attached, if the now plaintiff, within a year and a day, should disprove &c. (as before). That *F. W. Caldwell, &c.*, found pledges to restore &c. And thereupon *F. W. Caldwell, &c.*, sued out, according to the custom, a precept, whereby the serjeant was commanded that he should take the now defendant, if he should be found within the liberties of the city of *London*, and him should safely keep, so that he might have his body there in court without delay to satisfy the said *F. W. Caldwell, &c.*, the said 248*l.*, so attached &c. by due process of attachment and judgment of the court there recovered against him the now defendant, according to the custom, and should have the said moneys there in court without delay to render to *F. W. Caldwell, &c.*: that the now defendant, afterwards, and whilst the said precept was in the hands of the serjeant for the purpose of being executed, being then within the city &c., was forced to, and then and there necessarily did, for the purpose of satisfying the said judgment, pay to *F. W. Caldwell, &c.*, the said sum of 248*l.*, according to the exigency of the precept: and thereby the said *F. W. Caldwell, &c.*, then and there, according to the custom, had execution of the said 248*l.* against the now defendant, the said garnishee, according to the tenor of such judgment. And thereby the said execution then was executed; as by the record &c. That the execution

was duly executed in the said city, according to the custom; and that the judgment and execution are still in force. And that the said sum of 248*L.*, so attached and taken in execution, was the said sum of 248*L.* which, according to the said bond and the condition thereof, would become due from the now defendant to the now plaintiff on 1st *January* 1853; and the non-payment whereof on that day is, by the now plaintiff, alleged as a breach. And that the said sum was attached before the said 1st *January* 1853, and was from thence continually, until such payment thereof as last aforesaid, defended and kept in his hands by the serjeant under and by virtue of such action, and according to the same, and the usage and practice of the said court.

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Replications: 1. That the alleged debt in the plea mentioned to have been sued for by *F. W. Caldwell, &c.*, did not arise or accrue within the jurisdiction of the court in the plea mentioned; and that the said court had not jurisdiction over the same, or over the plaintiff, at any time during the alleged proceedings in the said plea mentioned; nor had the plaintiff notice of the said process or proceedings, or any opportunity of defending the same: whereby the same were and are wholly void.

2. That plaintiff has brought, and now prosecutes, this action as trustee for the benefit of *Edward Holmes Baldock*, to whom the whole beneficial interest in the money sought to be recovered belonged long before and during the said proceedings, as defendant always well knew, and still belongs. The plea then alleged an assignment, before the proceedings in the plea mentioned, of the bond, and the debt thereby secured, by himself to *Baldock*, by deed, for the purpose of securing a debt

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of 1500*l.* previously secured by mortgage, which was recited in the assignment, and averred in the replication, to be an insufficient security. The plea set out the indenture of assignment very fully. It transferred all plaintiff's right, legal and equitable, in the bond and the bond debt, to *Baldock*, constituted him plaintiff's attorney to sue &c.; and it was agreed therein that *Baldock* should apply the 800*l.* and interest to the satisfaction of so much as should remain due on the mortgage, and pay the residue, if any, to plaintiff. Averment: That 953*l.* 15*s.* 4*d.*, part of the 1500*l.*, has ever since remained, and still is, due and payable and unpaid by plaintiff to *Baldock*, and exceeds the amount of all the money secured by, or payable or to be paid under, the bond. That the deed still is in full force. That the beneficial interest in the said bond, and the moneys in and by the declaration mentioned and sought to be recovered thereby, became and was vested in *Baldock*, and since the time of the making of the deed, and until and during the proceedings in the plea mentioned, remained so vested and belonged &c., and not to plaintiff. Of which, and of the said assignment, "defendant, before the said proceedings or any of them, had notice. And the defendant allowed the said judgment to be given, and execution to issue against him, without setting up and, proving, in the said Court, the matter aforesaid." Averment: "That the said custom has not applied to, or included, and does not apply to, or include, debts the beneficial interest in which has become and is vested in a person other than the defendant sued in the said court in the plea mentioned, whereof the garnishee had notice; and that such debts as last aforesaid, the bene-

ficial interest in which has become and is vested in a person other than the defendant sued in the said court in this plea mentioned, whereof the garnishee has notice, have not been, nor are they, attached or attachable under the said custom."

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Demurrer to both replications. Joinder.

The case was argued on an earlier day in this term (a).

Crowder, for the defendant. As to the first replication. The want of notice will probably not be insisted upon: the question is whether the plaintiff is entitled to dispute the propriety of defendant's payment by denying the jurisdiction of the Mayor's court. The proceeding in the Mayor's court, according to the custom of *London* (which in this respect is the same with the customs of *Bristol* (b) and *Exeter* (c)), is merely process to compel the appearance of the defendant in the original cause. It is true that the plaintiff, in an inferior court, must prove that the cause is within the jurisdiction. But that is inapplicable to the case of the garnishee, who has been compelled to pay over the money. He cannot have the means of disputing the jurisdiction, as he is not privy to the transaction in which the alleged debt originates. In *De Haber v. Queen of Portugal* (d) this Court laid it down that, though the process of foreign attachment can be resorted to only where the cause of action arose within the jurisdiction of the court, the garnishee is safe by paying

(a) May 31st. Before Lord Campbell C. J., Coleridge and Crompton Js.

(b) *Bruce v. Wait*, 1 M. & G. 1.; and note (a) ib. p. 41.

(c) *Halse v. Walker*, 1 Rol. Abr. 554. *Customs de London*, (K) pl. 3.

(d) 17 Q. B.

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under the protection of the court. The objection, if properly taken, must prevail; but how can it be taken by the garnishee? In *Andreos v. Clerke* (a) it was held that the garnishee cannot plead in the Mayor's Court that his own debt to the defendant there arose without the jurisdiction. [*Willes*, for the plaintiff, admitted this.] The garnishee may insist upon the payment, when sued by his own creditor, without proving that the creditor was indebted at all to the party who made the attachment; *M'Daniel v. Hughes* (b), where cases which may appear to establish a contrary doctrine are explained in the judgment. Such are *Paramore v. Pain* (c) and *Coke v. Brainforth* (d), where the plaintiffs in the Mayor's court attached debts due from themselves to the defendants there; and it was held that the averments of debts in the Mayor's court were traversable in a plea of foreign attachment if the defendant in the court above was both plaintiff and garnishee in the court below. But that depended on the relation of the parties. The ordinary course of pleading is not to insert an allegation that the debt arose in the jurisdiction. [Lord Campbell C. J. May not that be only because the debt is presumed to have arisen within the jurisdiction till the contrary is shewn?] Such presumption does not arise in the case of an inferior court. Lord Ellenborough's language in *Huxham v. Smith* (e) agrees, indeed, with the explanation suggested; and the case itself is undoubtedly a direct authority against the present defendant. But that case was de-

(a) *Carth.* 25.(b) 3 *East*, 367.(c) *Cro. Eliz.* 598.(d) *Cro. Eliz.* 830.(e) 2 *Cumt.* 19.

cided, it seems, on the authority of the *Nisi prius* decision in *Palmer v. Hooke* (a); and Lord *Ellenborough*, in *McDaniel v. Hughes* (b), says that there must have been some mistake in the report of *Palmer v. Hooke* (a). In the court below the garnishee can plead only *Nil habet*. *Banks v. Self* (c) decides that the garnishee, in pleading the foreign attachment, need not aver that the original debt arose within the jurisdiction. According to the marginal note of *Harington v. Macmorris* (d) it is not necessary that the original debt should, in fact, arise within the jurisdiction: but this proposition, it must be admitted, is not borne out by the case. *Banks v. Self* (c) agrees with *Self v. Kennicot* (e). In *Bruce v. Wait* (g) *Tindal* C. J. appears to approve of the doctrine stated in the marginal note to *Harington v. Macmorris* (d). It does not appear that the debt in *Wetter v. Rucker* (h) arose within the jurisdiction of the Mayor's court: yet it was not questioned that the custom applied there, had it been strictly pursued. Plaintiffs will not be put to any difficulty by its being held that the debt cannot be inquired into as between themselves and the garnishees: they have only to put in bail within the year and the day; and then they can dispute the debt itself, or the jurisdiction, in the Mayor's court.

On the second replication, the question is whether the custom is applicable to debts, the beneficial interest in which is not in the defendant in the Mayor's court, the garnishee having notice of this before and during

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(a) 1 *Ld. Raym.* 727.(b) 3 *East*, 367. 380.(c) 5 *Taunt.* 234, note.(d) 5 *Taunt.* 228.(e) 2 *Show.* 506.(g) 1 *M. & G.* 1. 26.(h) 1 *Br. & B.* 491.

1853. the proceedings in that Court. The courts of common
 WESTON V. DAY. law cannot take notice of any debt arising upon a bond
 except as between the obligor and obligee. The equitable interest of a third party does not therefore prevent the attachment. It must be contended, on the other side, that the garnishee by evidence of this assignment might have supported a plea of Nil habet in the Mayor's court: but it is manifest that proof of a legal debt from himself to the defendant in that court would have defeated such plea. It was indeed held, in *Lewis v. Wallis* (a), that such debt is not liable to be attached. That case is not very clearly reported; and there appears to have been an attempt at trick, on the part of the defendant in the Mayor's court, which the Court above defeated: the point did not arise directly. The custom cannot be as alleged: the garnishee would be placed in a position of much hardship if he had to establish, for his own protection, an assignment of the debt from his creditor to a stranger.

Willes, contra. As to the first replication. It must be admitted that want of notice to the defendant in the Mayor's court does not prevent the attachment of the debt, provided there be a sufficient number of summonses with returns of Nil: and, after a year and a day, if the defendant does not put in bail within the year and day, the plaintiff in the Mayor's court retains the money attached as if it had been levied by execution. That, however, suggests a strong reason for not allowing the custom to take effect where there is want of original juris-

(a) 2 (T.) Jones, 222.

diction. That the want of such jurisdiction may be taken advantage of appears by *De Haber v. Queen of Portugal* (a) and *Wadsworth v. Queen of Spain* (a). Jurisdiction is as essential to the power of granting foreign attachment as to the power of pronouncing judgment in the original suit. And, in the cases cited, it was decided that a prohibition will go to the Mayor's court, though the defendant has not appeared and pleaded to the jurisdiction, though the garnishee has pleaded Nil habet there, and even though the application be made by a stranger. It seems to follow that the party insisting on the jurisdiction may be put to the proof, as here. It is not a case of mere absence of averment of jurisdiction. It appears, as an admitted fact, on this demurrer, that there was no jurisdiction. If it is argued that the garnishee, the present defendant, is hardly treated by such a state of law, it must be recollected that the opposite doctrine would be equally hard on the defendant in the Mayor's court, who might lose his debt, without notice, by process of a court having no jurisdiction. In *M'Daniel v. Hughes* (b) Lord *Ellenborough* appears to rely on the circumstance that, in the particular case, the defendants in the Mayor's court had notice, and did not defend or bail. In *Harington v. Macmorris* (c) the real decision was that matter averred in one plea cannot be used by the plaintiff in an issue on another plea, to prove facts denied in the latter. The marginal note as to the last paragraph (which alone is applicable here) is unauthorized, as appears also by the report in

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(a) 17 Q. B.

(b) 3 East, 367.

(c) 5 Taunt. 228.

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Marshall (a). Banks v. Self (b) goes only to the point of pleading: it may not be necessary to aver the jurisdiction: but, if there be an averment denying it, not traversed, the Court must deal with it. [*Crompton J.* If there be that distinction, the case is an exception from the ordinary rules of pleading.] The difficulty of proof cannot be an argument where the fact is admitted. [*Crompton J.* It is material as to the necessity of pleading.]

The question on the second replication is the more important one. The Court cannot, on this demurrer, inquire into the existence of the custom: that is admitted. The only question now must be, whether such a custom is necessarily bad. But it appears to be a very reasonable custom. The object of the attachment is to bring the original defendant into court. If he has no real interest in the property attached, he will not be induced to appear. The effect of the attachment, if there be no appearance, is execution: the original plaintiff will then be satisfied from that which is not the defendant's. The Legislature, in cases of bankruptcy and insolvency, require the courts of common law to look to equitable rights: the custom of the citizens of *London* seems merely to have done this several centuries earlier, and to have anticipated the principle which has prevailed from *Scott v. Surman (c)* to *Boddington v. Castelli (d)*. This part of the custom is here limited by the condi-

(a) *Harington v. Macmorris*, 1 *Marsh.* 33.

(b) 5 *Taunt.* 234, note.

(c) *Willes*, 400.

(d) 1 *E. & B.* 879, in *Exch. Ch.*, affirming the judgment of *Q. B.* in *Castelli v. Boddington*, 1 *E. & B.* 66.

tion that the garnishee shall have notice of the trust, which meets any objection as to hardship: and the demurrer in this case admits the notice. [Lord Campbell C. J. What ought the garnishee to have done?] He should, under his plea of Nil habet, have given in evidence the assignment of which he had notice. He would then have shewn that he held nothing which could be attached. The difficulty of proof is not greater than in the case of equitable rights coming into question where assignees of a bankrupt are parties. The complexity of the liability is no more a fatal objection here than it was in *Boddington v. Castelli* (a), where a party was held liable to different parties on one contract. The authority of *Lewis v. Walker* (b) is express.

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Crowder, in reply. As to the first point. In an *Anonymous* (c) case in *Ventris* it was held that a plea of foreign attachment need not express that the debt arose within the jurisdiction; "for perhaps it did not." This shews that the question was as to the legal result, not as to the pleading: had the jurisdiction been material at this step it must have been shewn by pleading, according to the law which prevails respecting inferior courts; *Peacock v. Bell* (d).

As to the second point: the analogy of bankruptcy and insolvency is inapplicable: the law there is the creature of statute.

Cur. adv. vult.

(a) 1 E. & B. 879.

(b) 2 (T.) Jones, 222.

(c) 1 Vent. 236.

(d) 1 Saund. 71, 74.

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Lord CAMPBELL C. J. now delivered the judgment of the Court.

‘We are of opinion that the defendant is entitled to our judgment upon the demurrer to the replication alleging that the debt sued for in the Mayor’s court did not arise within the jurisdiction of that court, and that the now plaintiff had no notice of the proceedings there. This replication allows that the plea replied to is good within the custom of foreign attachment in the city of *London*, and raises the question, whether the garnishee, after a regular judgment and execution against him, having paid the debt, may be compelled to pay it a second time on proof in this suit that the debt did not arise within the jurisdiction of the Mayor’s court. The affirmative would often work great hardship and injustice to the garnishee, who may be entirely ignorant of the origin of the debt sued for, who has no means of contesting the debt except by appearing and putting in bail to the original action, and who may be wholly unable to prove that the debt arose out of the jurisdiction of the Mayor’s court, although the fact be so. The plaintiff below, to render his proceedings effectual against the garnishee, is not even bound to prove the existence of the debt alleged to be due to him from the defendant below, nor to allege that it arose within the jurisdiction of the inferior court. In the recent case of *De Haber v. Queen of Portugal* (a) we expressed an opinion that “the process of foreign attachment can only be duly resorted to when the cause of action arose within the jurisdiction of the court from

(a) 17 Q. B.

which it issues." But we said: "the garnishee is safe by paying under the judgment of the court;" adding: "the objection that the cause of action did not arise within the jurisdiction of the court, *if properly taken*, must prevail." But, in the absence of fraud, the objection as against the garnishee comes too late after he has paid the debt to the plaintiff below under a regular judgment. It is said to have been ruled at *Nisi prius*, by Lord *Holt*, in *Palmer v. Hooke* (a), that on an *indebitatus assumpsit*, if the defendant gives in evidence a seizure of the debt under a foreign attachment, he must prove that the plaintiff was indebted at the time the attachment issued to the person who sued out the attachment. But this was expressly overruled in *McDaniel v. Hughes* (b), where Lord *Ellenborough* says: "As to the case in Lord *Raymond*, 727, before Lord *Holt* at *Nisi prius*, there must have been some mistake in that report; for it would defeat the whole effect of the custom of foreign attachment if the garnishee should, without means of proving it, be obliged to prove the debt of the plaintiff below in his own defence here, such plaintiff not having been before by the terms of the plea required to do so in the court below." In that case the defendant below had notice to defend, whereas here it is averred that he had no notice: but this circumstance cannot affect the rights of the garnishee. In contemplation of law, under the custom of the city of *London*, the defendant is always supposed to have notice by the warning of the serjeant at mace to appear; and a custom in an inferior court to issue process of foreign

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(a) 1 *Ld. Raym.* 727.(b) 3 *East*, 367.

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attachment for the purpose of compelling the appearance of the defendant, without a previous summons, is bad; *Bruce v. Wait* (a). The plaintiff's counsel further relied on *Huxham v. Smith* (b), in which, in an action similar to *Palmer v. Hooke* (c), Lord *Ellenborough* is supposed, after holding that payment by the garnishee under a regular judgment of the Mayor's court is *prima facie* a discharge to him, to have admitted evidence that the debt sued for in the court below did not arise within the jurisdiction. But, if Lord *Ellenborough* is accurately reported, he must have forgotten the solemn decision of the Court in *McDaniel v. Hughes* (d), which he himself pronounced: and, the proof having failed, there was no opportunity of having the question reconsidered. However, it was subsequently reconsidered in *Harington v. McMorris* (e) and *Banks v. Self* (g); in which, although the reports are not quite satisfactory, the Court of Common Pleas appears to have fully recognised the decision of this Court in *McDaniel v. Hughes* (d). Even allowing that, after payment by the garnishee under a regular judgment, he cannot be prevented from availing himself of the discharge by evidence to disprove the debt due from the defendant to the plaintiff below, a distinction was taken between that case and the present, where the existence of the debt is admitted, and the objection relied upon is that it did not arise within the jurisdiction of the inferior court; and reliance was placed upon the supposed remedy of the garnishee before the judgment by moving for a prohibition. But

(a) 1 M. & G. 1.

(c) 1 Ld. Raym. 727.

(e) 5 Taunt. 228.

(b) 2 Campb. 19.

(d) 3 East, 367.

(g) 5 Taunt. 234, note.

the hardship and injustice to the garnishee, by reason of which it was held that the existence of that debt cannot be controverted when he is afterwards sued for the debt which was attached, would be fully as great if, as between the garnishee and his creditor, the existence of the debt between the plaintiff and the defendant below could be controverted; and there appears to be neither reason nor authority to support this distinction between inquiring into the existence of the debt and into the locality within which it arose. Therefore on this demurrer there must be judgment for the defendant.

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But we are of opinion that we are bound to give judgment for the plaintiff on the demurrer to the last replication, which alleges that, within the knowledge of the defendant, before the suit was instituted in the Mayor's court, the bond declared upon had been assigned by the plaintiff for valuable consideration; that the plaintiff only held it as trustee for the assignee; that the defendant allowed the judgment to pass in the Mayor's court without setting up this matter as a defence; that this action is brought for the benefit of the assignee; and that the said custom has not applied to or included, and does not apply to or include, debts the beneficial interest in which has become and is vested in a person other than the defendant sued in the said court in the plea mentioned, whereof the garnishee had notice; and that such debts, the beneficial interest in which has become and is vested in a person other than the defendant sued in the said court in the said plea mentioned, whereof the garnishee has notice, have not been nor are they attached or attachable under the said

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custom. Issue might have been taken upon this qualification of the custom : and thereupon the true custom would have been certified by the present Recorder of *London*, according to the form pursued by Mr. Recorder *Sterkey* (a) in the reign of *Edward* 4. But upon this demurrer we must take the custom to be so qualified, unless the qualification be contrary to the rules of law. We think that it is highly just and reasonable : for, if debts and goods could be attached in which the garnishee has no beneficial interest, the claim of the plaintiff below may be satisfied out of the property of a stranger living in a distant country. The defendant's counsel said truly that this qualification would render it necessary for courts of law in certain cases to take cognizance of trusts, and further urged that in no case can they do so. - If *Bottomley v. Brooke* (b) and the cases following it, decided in the time of Lord *Mansfield*, can no longer be supported, and the doctrine on which they rest can only be established by the authority of the Legislature, yet, in *Winch v. Keeley* (c), it was decided that, if a person to whom a debt is due as trustee becomes bankrupt, he and not his assignees shall sue to recover the debt ; and this has been followed by a long string of cases down to *Boddington v. Castelli* (d), in which a judgment of this Court was affirmed upon writ of error in the Exchequer Chamber, during last term. In all these cases, a court of law must take notice of the

(a) *Bowser v. Collins*, Yearb. M. 22. E. 4. fol. 30 A. B. pl. 11. And see *Crosby v. Hetherington*, 4 M. & G. 933. 952 : and note (1) to *Turbill's Case*, 1 Wms. Saund. 67.

(b) Cited 1 T. R. 621.

(c) 1 T. R. 619.

(d) 1 E. & B. 879.

relation of trustee and cestui que trust of personal property. This being a custom of the city of *London*, it will be good if it existed in the beginning of the reign of *William* and *Mary*: but we can see no objection to the validity of such a custom in any city in which it must be supposed to have existed immemorially; for the distinction between the interest of a trustee and a beneficial interest is founded upon reason, and must exist where any progress has been made in commerce and civilization: and there is no ground for alleging that a court of law could not have acted on that distinction in the reign of King *Richard* 1. as in the reign of Queen *Victoria*. The plaintiff having by this replication averred a qualification of the custom, according to which property held by the garnishee would not be attachable, and shewn that the now plaintiff, the defendant below, held the bond declared upon only as trustee, he shews that it was not attachable, and that he is still entitled to sue upon it. This is perfectly consistent with the finding of the jury upon the issue of *Non habet* or *Non debet*; for the obligor was indebted to the obligee on the bond, and the obligee had the bond, although only as trustee. It must be remembered that the custom, as set out in the plea, does not shew the qualification; and that the issue was not, Whether the bond was attachable according to the qualified custom. The case of *Lewis v. Wallis* (a) is in accordance with this view of the subject. *Parker* being the garnishee, and *Wallis*, to whom the debt was due, having previously assigned the debt to *Snell*, "the Court was of opinion that, after the assignment by *Wallis* to *Snell* of *Parker's* debt, it was

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(a) 2 (T.) Jones, 222.

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in truth the right and property of *Snell*, and that the said *Wallis* had nothing in it but in trust for *Snell*, and it ought to have been allowed so on shewing of this before the Lord Mayor according to the course there; and this now has obtained allowance in all courts by long usage." Therefore, upon this demurrer to the last replication, we give judgment for the plaintiff.

Judgment accordingly.

The defendant also, secondly, rejoined to the second replication: That "the said custom has applied to and included, and does apply to and include, debts, the beneficial interest in which has become and is vested in a person other than the defendant, sued in the said court in the said second replication mentioned, whereof the garnishee has notice; and that such debts as last aforesaid, the beneficial interest in which has become and is vested in a person other than the defendant sued in the said court in the said second replication mentioned whereof the garnishee has notice, have been and still are attached and attachable under the said custom."

Rebutter. "The plaintiff, as to the second rejoinder to the second replication, takes issue thereon: and he prays that the same may be inquired of when and where and as the Court may consider. And the defendant does the like &c."

"And hereupon it is suggested by the plaintiff, and manifestly appears to the Court, that there is and immemorially has been, in the said city of *London*, a certain custom therein used and approved of: that, when any issue in any court of our Lady the Queen, or her predecessors, is or has been joined therein as aforesaid, upon any custom of the said city used and had, the Mayor and

aldermen of the said city have, from time immemorial, certified to and informed the said Court and the Judges thereof, and ought from time immemorial, and still ought, so to certify and inform the said Court, and the Judges thereof, the said custom, and of and concerning the same, by the learned Recorder of the said city, verbally. And the plaintiff prays a writ of our Lady the Queen, to be directed to the Mayor and aldermen of the said city, commanding them to certify to and inform the Court of our Lady the Queen, before the Queen herself, in manner aforesaid, Whether the custom of foreign attachment in the said plea mentioned, used in the court of our Lady the Queen holden before the Mayor and aldermen of the said city for the time being, in the chamber of the *Guildhall* of the said city, within the said city, has applied to and included, and does apply to and include," &c. (following the second rejoinder to the second replication). "And, because the defendant does not deny this, therefore the said writ is granted to the plaintiff, returnable" &c. "The same day is given to the said parties at the same place."

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The following certiorari then issued :

"*Victoria*, by the grace" &c. "To the Mayor and aldermen of Our city of *London*, greeting. Whereas a certain action hath been lately brought, and is now pending, in Our Court before Ourselves at *Westminster*, between *William Amos Scarborough Westoby*, plaintiff, and *Edward Augustus Day*, defendant, for the recovery of certain moneys by the said plaintiff alleged to have been due and payable to him by the said defendant, in which action a certain issue hath arisen and is joined between the said parties, as We are informed : Whether the custom of foreign attachment, in the plea in the said

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suit mentioned, used in Our court, before the Mayor and aldermen" &c., "has applied" &c. (as in the second rejoinder to the second replication): "And because it pertaineth to you, by the Recorder of the said city, according to the custom of the said city, from time immemorial used and approved of therein, to try the truth of the aforesaid issue, and to certify the aforesaid custom, and of and concerning the same, by word of mouth, and not otherwise, by the learned Recorder of Our said city, We command you that you certify and make known, in manner aforesaid, to Our Court before Us, wheresoever" &c., "on the 8th day of *June* next, the truth respecting the said issue; and have there this writ. Witness *John Lord Campbell*, at *Westminster*, the 23d day of *May*, in the year of our Lord 1853."

Afterwards, in *Michaelmas* Term 1853 (*November 9*), *Wortley*, Recorder of *London*, appeared in Court, and verbally certified as follows.

"We, *Thomas Challis*, Mayor, and the aldermen of the city of *London*, in pursuance of a certain writ to us directed, in a cause pending in Her Majesty's Court of Queen's Bench, at *Westminster*, wherein" &c. (the parties in Q. B.), "wherein a certain issue hath arisen and is joined between the said parties, as the said Court is informed: Whether the custom of foreign attachment, in the plea in the said suit mentioned, used in Her Majesty's court holden before us the Mayor" &c. (as in the second rejoinder to the second replication.): "To certify, as it pertaineth to us, the said Mayor and aldermen of the said city of *London*, by the Recorder of the said city, according to the custom of the said city, from time immemorial used and approved of therein, to try the truth of the aforesaid issue, and to certify the

aforesaid custom, and of and concerning the same, by word of mouth, and not otherwise, by the learned Recorder of the said city: Do certify and make known, in manner aforesaid, to Her Majesty's Court of Queen's Bench, at *Westminster*: That the custom of foreign attachment, in the plea in the said suit mentioned, used in the said court of Mayor and aldermen in the said city for the time being, in the chamber of the *Guildhall* of the said city, within the said city, has not applied to and included, and does not apply to and include, debts, the beneficial interest in which has become and is vested in a person other than the defendant, sued in the said court, whereof the garnishee has notice: and that such debts as last aforesaid, the beneficial interest in which has become and is vested in a person other than the defendant sued in the said court, whereof the garnishee has notice, have not been, and are not, attached and attachable under the said custom. All of which we humbly certify. Dated" &c.

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Willes, for the plaintiff, then prayed that the certiorari and return (which was engrossed on parchment, and signed by the Mayor and thirteen aldermen) should be filed: which was ordered: and the two were filed in the treasury of this Court.

In the same Term (*November 14, 1853*), the Court, on the appearance of *Willes* for the plaintiff and *Field* for the defendant, ordered judgment to be entered for the plaintiff.

Judgment for the plaintiff.

END OF TRINITY TERM.

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CASES

ARGUED AND DETERMINED

IN

TRINITY VACATION,

XVI. VICTORIA (a).

*Saturday,
June 25th.*

THOMSON, administrator of BOSVILLE, *against*
HARDING and FABER.

The creditor of a deceased person may retain, against the representative of the deceased, payments made to him out of the assets of the deceased, in due course of administration, by an executor de son tort, if the executor de son tort was really acting as executor so that the creditor might reasonably suppose him to be rightful representative. But acts sufficient to make the executor de son tort chargeable as such do not necessarily make the payment good against the rightful executor.

THE plaintiff sued as administrator of *Alexander William Robert Bosville*, deceased, for 2654*l.* 6*s.* 6*d.*, money payable by defendants to plaintiff for money received by them to the use of plaintiff as such administrator and for money due to plaintiff as such administrator on accounts stated between plaintiff and defendants.

“And the plaintiff, as such administrator as aforesaid, claims 2654*l.* 6*s.* 6*d.*, being compounded of the several sums of 906*l.* 12*s.*, 747*l.* 14*s.* 6*d.*, and 1000*l.*, paid into the banking house of the defendants by the late *Richard*

(a) The Court sat in banc on *June* 25th, for the purpose only of delivering judgments.

Smith, the respective times of such payments appearing by the defendant's books. And the plaintiff will claim interest" &c.

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Plea: Never indebted. Issue thereon.

On the trial, before *Cresswell J.*, at the *Yorkshire Spring Assizes 1853*, it appeared that the intestate had an estate for life in lands let to various tenants. The defendants were bankers at *Bridlington* in *Yorkshire*; and the intestate kept an account with the bank. He was in the habit of overdrawing his account largely: and, on 14th *January 1833*, he executed a bond to the then partners in the bank, in the penal sum of 4000*l.*, conditioned to secure such disbursements as they, or the partners for the time being, should make for him, not exceeding 2000*l.* in all. He died, on 23d *September 1847*, being then indebted to the bank in above 2000*l.* *Richard Smith*, named in the last count, was, for some years before and up to the time of the intestate's death, the collector of his rents; and, from the rents so collected, *R. Smith* used, during the intestate's life, to pay sums into the bank to the intestate's account. After the intestate's death, *R. Smith* was continued in the employment as collector by the succeeding remainder man. After the intestate's death, *R. Smith* paid in to the bank the three sums mentioned in the last count, which consisted of rents collected, accruing some before and some after the death of the intestate. The payments in respect of rents accrued before the intestate's death, and of the portion of rents due to his estate upon apportionment for the quarter current at the time of such death, did not together exceed the sum due from the intestate to the bank. At the time of the intestate's death one of the obligees of the bond, *Edwin Smith*, was alive: and *Richard Smith*, on making the last of the three

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payments (the 1000*l.*), took back the bond from the bank. *Richard Smith* paid several other creditors of the intestate from rents accrued before the intestate's death, which he collected after the intestate's death. Subsequently to the making of these payments into the bank and to the creditors, administration was taken out, on 29th *January* 1849. *Richard Smith* died on 2d *September* 1849. The jury found, in answer to a question from the learned Judge, that *Richard Smith* paid the three sums, mentioned in the last count, as in satisfaction of the debt owing to the bank from the intestate. On these facts the learned Judge expressed an opinion in favour of the defendants: and the plaintiff was nonsuited, leave being reserved to move to enter a verdict for him.

In *Easter Term*, 1853, *Watson* obtained a rule accordingly. In last Term (*a*),

Knowles and *R. Hall* shewed cause. *R. Smith*, having intermeddled in numerous instances with the estate, was executor de son tort: and therefore his payment of a creditor cannot be invalidated, unless he has paid creditors of a lower degree before those of a higher, which is not suggested. On moving for the rule, *Mountford v. Gibson* (*b*) was cited. There it was held that a creditor of an intestate could not retain goods handed over to him in satisfaction of this debt, out of the intestate's estate, by a party not entitled to intermeddle. But there the party intermeddling was not shewn to have acted as executor de son tort except in respect of the single act in question. And *Le Blanc J.* said (*c*):

(*a*) June 2d. 1853. Before Lord Campbell C. J., Coleridge and Crompton Js.

(*b*) 4 *East*, 441.

(*c*) 4 *East*, 455.

"if it had appeared here that the defendant had received the goods from a person from whom he was in a condition to have enforced payment by law, by shewing that she was executrix de son tort, he might have brought himself within some of the authorities which have been cited," namely, for the defendant. That is the present case. *Padget v. Priest* (a) shews that the bank might have recovered the money from *R. Smith*, as executor: the acts done by *R. Smith* are not disputed; and, from the case last mentioned, it appears that it is for the Court to judge whether such acts made him executor de son tort: which appears also from *Sharland v. Mildon* (b). In 1 *Williams on Executors*, 221 (4th ed.), P. 1. B. III. ch. 5., it is said: "there are several authorities to shew, that if the rightful executor or administrator bring an action of trover or trespass, the executor de son tort may give in evidence, under the general issue, and in mitigation of damages, payment made by him in the rightful course of administration:" and *Graysbrook v. Fox* (c) is cited. If that be so, it follows that the payment cannot be impeached as against the creditor. [Lord Campbell C. J. It would seem to follow from that that a stranger could, by intermeddling, give a preference among creditors of equal degree.] An executor de son tort, after action brought by a simple contract debtor, may pay a special debt and plead such payment in bar; *Oxenham v. Clapp* (d). [Lord Campbell C. J. There the case of the plaintiff is that the defendant is executor: that might well estop the plaintiff from disputing the acts which could be lawfully done by an executor.] It is true that, in *Woolley v. Clark* (e), it was held that an

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(a) 2 T. R. 97.

(b) 5 Hare, 469.

(c) *Plowd.* 275. 282.

(d) 2 B. & Ad. 309.

(e) 5 B. & Ald. 744.

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executor de son tort could not set up, as against the rightful executor, an administration of the assets in mitigation of damages. But in the note (r) in 1 *Williams on Executors*, 222 (4th ed.), Pt. I. Book. III. ch. 5. the following remark is made on that case: "It must be observed, that the authorities in favour of the right of an executor de son tort to recoup, in damages, payments made in a due course of administration, were not cited in the argument of this case, nor was the point mentioned: Ideo quære, whether it must be understood as overruling them." In *Com. Dig. Administrator* (C 3.) it is said: "If he plead plene administravit, he shall not be charged beyond the assets, which come to his hands." "And therefore, he shall be allowed, if he pay debts to creditors." In later editions of *Comyns's Digest* it is added: "A legal act done by an executor de son tort will bind the rightful executor;" for which *Parher v. Kett* (a) is cited. If there is a person who can be sued, the Statute of Limitations will run: and, if six years had elapsed without administration being taken out, the defendants, unless they had sued *R. Smith*, would have been barred; *Webster v. Webster* (b). [Lord Campbell C. J. referred to *Murray v. The East India Company* (c).] It cannot be law that the defendants were entitled to sue *R. Smith*, and yet cannot receive payment from him.

Watson and *Stammers*, contra. *R. Smith* simply continued to do as he had done before the death. If the view taken on the other side of the effect of *Padget v. Priest* (d) be correct, it will follow that every

(a) 1 *Ld. Raym.* 658. 661.(b) 10 *Ves.* 93.(c) 5 *B. & Ald.* 204.(d) 2 *T. R.* 97.

person who gets into his hands money of a deceased party is executor de son tort. The authorities carry the law no farther than the principle to be collected from *Oxenham v. Clapp* (a), namely, that a party, charged in the character of executor, may, as against the party so charging him, insist on the propriety of all such acts as would be proper if done by a rightful executor. But, where his right to act as executor is impeached in the action, all his acts must be treated as unlawful if he is not rightful executor. A single payment by a stranger may be impeached; *Mountford v. Gibson* (b): how can that payment be made valid by other payments each in themselves invalid? The argument on the other side invests the executor de son tort with the power of a legal executor; so that he might, for instance, deliver back goods sold before the death of the vendee in satisfaction of the price. [Coleridge J. There seems to be a distinction taken in *Buller's Nisi Prius*, 48., that an executor de son tort, though he might give in evidence the actual sale of the deceased's goods, and the application of the money in payment, could not retain goods not actually sold, on the ground that he had made payments to that amount.] *Woolley v. Clark* (c) has not been distinguished. [Lord Campbell C. J. The executor de son tort there made payments after he had notice of the rightful executorship: it seems to have been considered that he did not act bonâ fide.] There was no demand made on *R. Smith*, for payment of the bond. In *Parker v. Kett* (d) the reason assigned by the Court, for not allowing a rightful payment by an executor de son tort to be impeached, is that "the creditors

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(a) 2 B. & Ad. 309.

(b) 4 East, 441.

(c) 5 B. & Ald. 744.

(d) 1 Ld. Raym. 661.

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pointed out in *Wentworth's Office of Executors*, 182 (a), that a stranger might usurp the office of executor and destroy the election of the rightful executor. On the other side, there is the hardship to the creditor if rightful payments to him be not protected: and he would be protected, if the rule were that he might receive the money from one whom he had reasonable ground for believing to be an executor. That view does seem, to a certain degree, to be countenanced by what is said in *Parker v. Kett* (b), *Read's Case* (c) and *Mountford v. Gibson* (d). But the point does not seem to have been made at the trial: and I do not know that we can notice it now.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

We are of opinion that the rule to enter a verdict for the plaintiff ought to be discharged.

Upon the evidence, it appears that *R. Smith*, employed to receive the rents of the deceased in his life time, after his death continued to receive rents due to him in his life time, and, no other representative of the deceased appearing, paid various debts due from the deceased. The defendants were the bankers of the deceased. And the jury found that *R. Smith* paid them the sums sought to be recovered, to satisfy a debt due to them from the deceased. A considerable time afterwards, administration was granted to the plaintiff; and the present action was brought.

(a) Edd. 1703, 1763 (pp. 334, 5, in 14th ed.).

(b) 1 *Ld. Raym.* 661.

(c) 5 *Rep.* 33 b.

(d) 4 *East*, 441.

We are by no means of opinion that, as against a person who becomes the rightful representative of a person deceased, every payment from the assets of the deceased shall be valid, if made by a person who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor de son tort. This he may do, according to the old authorities, by taking a dog or milking a cow of the deceased; and he may clearly do wrongful acts, which would render him liable to be sued as executor de son tort, without giving validity to his alienation of the property of the deceased; "for then any stranger might usurp the office of executor, and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor the power to pay himself before others, in case there were a debt due to him, which were very unreasonable;" *Wentworth's Office of Executor*, 182 (a). "A single act of wrong is taking the goods of the intestate, though it may be sufficient to make the party an executor de son tort with respect to creditors who may choose to sue him in that character, yet will not give him any right to retain them as against the lawful administrator." "When it is laid down generally that payments made in the due course of administration by one who is executor de son tort are good, that must be understood of cases where such payments were made by one who is proved to have been acting at the time in the character of executor." "An act" "may be well sufficient to charge the party himself as executor de son tort, which would not be sufficient to justify a wrong-doer claiming title under

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(a) Edd. 1703, 1763 (p. 335 in 14th ed.).

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it." So the law is expounded by Lord *Ellenborough* in *Mountford v. Gibson* (a). But, where the executor de son tort is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property. Says Lord *Holt*, in *Parker v. Kett* (b): "The reason is, because the creditors are not bound to seek further than him who acts as executor; therefore, if an executor de son tort pays 100*l.* of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor."

In the present case, *R. Smith* may be considered as acting in the character of executor, seeing that for months he administered the assets of the deceased; and the defendants, when the payments were made to them by him in satisfaction of their debt due to them from the intestate, might reasonably have supposed that he had authority to make the payments.

This being taken as a fact (and there was no desire expressed at the trial that it should be left to the jury), we are of opinion that the nonsuit was right.

Rule discharged.

(a) 4 *East*, 445, 416, 447.

(b) 1 *Ld. Raym.* 661.

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RANDALL *against* STEVENS and others.Saturday,
June 25th.

TRESPASS for entering the dwelling house of plaintiff, breaking, damaging, carrying away and converting goods of plaintiff being in the dwelling house, assaulting plaintiff, ejecting him from the dwelling house, and demolishing the same and certain goods of plaintiff; whereby part of the house fell on *Susanna Randall*, plaintiff's daughter and servant, and injured her (special damage to plaintiff). There was a second count, not varying from the first, so far as regards the point decided.

Plea 2. Except as to so much of the declaration as relates to the alleged assaulting plaintiff, and the alleged injury to *Susanna Randall*, that the dwelling house and goods &c. were not the property of plaintiff. Issue thereon.

There were other issues of fact, not now material.

On the trial, before *Talfourd J.*, at the last *Oxford Assizes*, the following facts appeared, as stated by Lord *Campbell C. J.* in the judgment upon the case after mentioned. "The material facts were that, at *Whitsuntide* 1818, the overseers of the parish put the plaintiff into possession of the cottage as a parish pauper. He continued in uninterrupted possession, without paying any rent, till a day in the month of *April* 1839: the overseers then took proceedings against him with a view to get possession of the cottage before he could set up a claim to it under the Statute of Limitations. They accordingly entered upon it, turned out him and his

Before the passing of stat. 3 & 4 W. 4. c. 27., *R.* was let into possession of land as tenant at will to *S.* He never paid rent. After the statute passed, and before twenty one years had elapsed from *R.* being so let into possession, *S.* entered and turned *R.* out. *R.* immediately afterwards resumed possession; but no fresh tenancy at will commenced; and he paid no rent. Held: that *S.* might enter, at any time before the lapse of twenty years from such resumption of possession by *R.*, though after the lapse of twenty one years from the first letting *R.* into possession; and was not barred by sects. 2, 7, 10.

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family, and removed nearly the whole of his furniture and goods. Shortly after, on the same day, he resumed the possession of the cottage. There was evidence that he agreed to pay a weekly acknowledgment; but the jury found that he neither then nor afterwards became a weekly tenant, or tenant at will, to the overseers. He continued in possession till the 24th day of *July* 1852, when the overseers entered; and, he refusing to deliver up the cottage, they destroyed it. For this alleged trespass the action was brought." The counsel for the defendants contended that, as parish officers, they had, under stat. 59 *G. 3. c. 12. s. 17.*, the right to enter and resume possession of the house. For the plaintiff it was contended that the right of entry was barred by stat. 3 & 4 *W. 4. c. 27.* The learned Judge directed the jury to assess the damages separately for the different causes of complaint: and they accordingly found a verdict for 20*L.* for the damages in respect of the house, 1*L.* for the damage in respect of the goods, and 5*s.* for the injury done to the daughter. The learned Judge then directed a verdict to be found for the plaintiff for this amount, reserving leave to the defendants to move as after mentioned.

Keating, in *Easter Term*, 1853, obtained a rule to shew cause why a verdict should not be entered for defendants as to so much of the issues as applied to the house, and the damages be reduced to 1*L. 5s.* In last Term (*a*),

Whateley and *Dowdeswell* shewed cause. The question turns upon stat. 3 & 4 *W. 4. c. 27.* By sect. 2 the entry of

(*a*) *June* 9th. Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

defendants was unlawful if the right under which they claimed to enter first accrued more than twenty years before the entry. By sect. 7, the plaintiff being tenant at will, the defendants' right "first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." The entry in 1852 was made more than twenty years after the expiration of the one year after the commencement of the tenancy at will: and the only question is whether what happened in 1839, which was within the twenty years after the expiration of one year from the commencement of the tenancy at will, makes any difference. Now the jury have found that no new tenancy was created. *Doe dem. Goody v. Carter (a)* is therefore an express authority for the plaintiff. There it was held that, after twenty one years' possession, commencing with the entering into possession by a tenant at will, no rent having been paid, the right of the landlord was barred, though, within twenty one years of such commencement, and less than twenty years before action brought, he had taken a fresh conveyance of the land (which altered his own estate from equitable to legal), and had mortgaged it; the Court saying that the conveyance did not operate as a determination of the will; and that, even assuming that the mortgage operated as such determination, or indeed if the conveyance did so, still a tenancy at sufferance was created, and the time would continue to run, there being nothing from which a jury could infer a new tenancy. Here the supposition of a new tenancy is negatived by

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the jury. The Court there relies on *Doe dem. Bennett v. Turner* (a), where, as here, there was an actual entry; but, as no new tenancy was created, it was held that such entry did not interrupt the continuous possession. On a second trial, in the case last mentioned, it was found by the jury that a new tenancy at will was created at the time of the entry; and the plaintiff therefore had judgment; *Turner v. Doe dem. Bennett* (b). [Lord Campbell C. J. Do you say that, where there is no payment of rent, a tenancy at will cannot exist more than a year?] For the purposes of the statute it cannot. [Coleridge J. You apply that, I suppose, only to a tenancy at will in the strict sense of the words.] No further. It is clear that in *Doe dem. Bennett v. Turner* (a) there was a determination of the will; the mere entry, which would otherwise have been a trespass, had that effect (c). And, inasmuch as there might, in the course of twenty one years, be many acts done by the landlord which technically might be construed as a determination of the will, it seems a very reasonable construction, that, unless there be a new tenancy created, the time shall be treated as uninterrupted, thus preventing the impeachment of possession by proof of such acts many years after they may have been done. [Erle J. If the landlord had remained in till within a day of the expiration of the twenty one years, would the tenant at such expiration have had an indefeasible title?] The tenant here was, legally speaking, never out of possession. [Erle J. When the parish officers were on the land, he was not in possession. In *Doe dem. Bennett v. Turner* (a)

(a) 7 M. & W. 226.

(b) 9 M. & W. 643., in Exch Ch., in error upon a bill of exceptions.

(c) Co. Litt. 65. b.

it seems to have been held only that a mere entry consistent with the continuance of the tenant's possession, as by taking stone, would not interrupt the possession. Lord *Campbell* C. J. Sect. 10 enacts: "that no person shall be deemed to have been in possession of any land within the meaning of this Act *merely* by reason of having made an entry thereon:" the proceedings of the overseers seem to have gone far beyond a "mere" entry.] The defendants, upon that view, should have insisted upon the jury being asked whether the plaintiff had been put out of possession. Nothing now appears beyond a hostile assertion of right. [Lord *Campbell* C. J. If there were any right of entry created by the proceedings in 1839, we must hold the entry now in question to have been made in pursuance of such right, rather than of an earlier one, according to our decision in *Keyse v. Powell* (a).] The tenancy at will was determined at the end of the one year from its commencement, by the express words of sect. 7; there could not, therefore, be a determination afterwards: and so the enactment seems to be understood by Lord *St. Leonards*, in *Sugden's Vendors and Purchasers*, p. 622 (11th ed.), ch. xi. sect. v. §§ 52, 53, 54. [Crompton J. That is, if there be no express determination of the will, the Legislature construes it to have been determined at the end of the first year.] In *Doe dem. Dayman v. Moore* (b) it was held that the twenty one years' possession commencing with a tenancy at will might be insisted upon, though the land had, within twenty years, been expressly devised for life by the landlord to the wife of the tenant at will, who had recognised the devise by receiving an annuity bequeathed thereby to his wife. [Lord *Campbell* C. J.

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(a) Ante, p. 132. 147.

(b) 9 Q. B. 555.

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In that case, and in *Doe dem. Goody v. Carter* (a), the landlord had no possession at all during the twenty one years.] In *Garrard v. Tuck* (b) the Court said that the object of sect. 7 "obviously is, to fix a definite period after the commencement of a tenancy at will, beyond which the tenancy shall not be presumed to have had a continuance." Sect. 8 is in *pari materia*. There the time runs from the determination of the first year or the last receipt of rent, "which shall last happen;" from which express enactment it may fairly be inferred that, in sect. 7, where there are no such words, the time was to run from the alternative which should first happen. The two sections seem to be so understood in *Sugden's Vend. and Purch.* 628 (11th ed.), ch. xi. sect. v. § 72., and in *Sugden's Essay on the New Statutes &c.*, p. 54 *et seq.* *Doe dem. Evans v. Page* (c) may be cited on the other side: but that case shews only that sect. 7 does not apply when the tenancy at will has ceased before the statute passed: but it seems to be there understood, by the Court, that, in the case of tenancies at will not determined till after, the right is barred by twenty one years, reckoned from the commencement of the tenancy: and that is the present case. The same explanation applies to *Doe dem. Birmingham Canal Company v. Bold* (d). In *Doe dem. Jukes v. Sumner* (e) the Court of Exchequer held that sect. 8 applies to tenancies created before the Act and existing at the time of its passing.

Keating and *Phipson*, *contra*. The tenancy at will existed, in this case, at the time of the passing of the

(a) 9 Q. B. 863.

(b) 8 Com. B. 231. 251.

(c) 5 Q. B. 767.

(d) 11 Q. B. 127.

(e) 14 M. & W. 39.

statute: after that time, and before twenty one years had elapsed from the commencement of the tenancy, the parish officers entered upon the plaintiff. Upon such entry they were possessed, and the plaintiff was dispossessed: from that time a new state of things commenced: while they were in possession the defendant was a mere stranger. [Lord Campbell C. J. He clearly would then be on the land only as a trespasser.] Reliance is placed on *Doe dem. Bennett v. Turner (a)*. But all that was necessary for the decision of that case was that the tenancy at will was there determined, and that the time was interrupted if a fresh tenancy was created. The dictum, that if, at the determination of the tenancy at will, the tenant had continued to occupy as tenant at sufferance the entry would have been barred, was not necessary to the case: nor was that doctrine acted upon in the Court of Error; *Turner v. Doe dem. Bennett (b)*. But, if the effect of the decision in *Doe dem. Bennett v. Turner (a)* be as contended on the other side, the case is overruled by *Doe dem. Evans v. Page (c)*. In that case a tenancy at will was followed by what, before the statute, would have been an adverse possession; but the action, being brought within twenty years of the expiration of the tenancy at will, was held not to be barred by the lapse of twenty one years from the commencement of such tenancy at will. It is true that the judgment of the Court rested upon their view that sect. 7 was not retrospective, and the fact that the tenancy at will expired before the statute passed. But that was also the case in *Doe dem. Bennett v. Turner (a)*.

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(a) 7 M. & W. 226.

(b) 9 M. & W. 643.

(c) 5 Q. B. 767.

1853. The latest case is *Doe dem. Birmingham Canal Company v. Bold* (a), which affirmed *Doe dem. Evans v. Page* (b), though *Doe dem. Bennett v. Turner* (c) was cited. *Doe dem. Goody v. Carter* (d) is no otherwise applicable to this case than as apparently recognising the dictum in *Doe dem. Bennett v. Turner* (c): and there *Doe dem. Evans v. Page* (b) was not cited. But in no case has there been an actual taking of possession, as here. It is said that the effect of this ought to have been left to the jury: but the act was unequivocal; and there was no dispute as to its effect. The reasonable view is that, from the time of the owner resuming possession, though he parts with it again, a fresh period of time begins to run; which, if the possession of the person whom he suffers to occupy were continued uninterruptedly for twenty years, would, according to the expression in *Sugden's Vend. and Pur.* 622 (11th ed.), ch. xi. sect. v. § 54., “vest the fee simple in the tenant at will, for the remedy of the owner will not only be barred, but his estate extinguished;” and, as said by *Parke B.* in *Doe dem. Jukes v. Sumner* (e), “make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed.” But the Legislature can never have intended to prevent the owner from taking steps during the twenty years to prevent such a title being gained against him.

Cur. adv. vult.

LORD CAMPBELL C. J. now delivered the judgment of the Court.

(a) 11 Q. B. 127.

(b) 5 Q. B. 767.

(c) 7 M. & W. 226.

(d) 9 Q. B. 863. See *Doe dem. Carter v. Barnard*, 13 Q. B. 945.

(e) 14 M. & W. 42.

The question for our determination in this case is, whether, on the 24th day of *July* 1852, a certain cottage in the pleadings mentioned had ceased to be the property of the parish officers to whom it had belonged. The material facts were: His Lordship then stated them, as *antè*, p. 641. And the defendants pleaded that the cottage was not the plaintiff's.

Independently of any decision, it appears quite clear to us that, according to the just construction of stat. 3 & 4 *W. 4. c. 27.*, the title of the overseers was not barred. By sect. 2 of that statute, it is enacted that "no person shall make an entry" "to recover any land" "but within twenty years next after the time at which the right to make such entry" "shall have first accrued." Within twenty years next after the time when such right first accrued the entry may be made. Now it is not disputed that in *April* 1839 the overseers determined the tenancy at will, which had subsisted since *Whitsuntide* 1818, before the Statute of Limitations had run: and they were then actually in possession of the cottage. When the plaintiff again took possession of the cottage, a right to make an entry upon it accrued to them: and we conceive that they were entitled to enter at any time within twenty years from that day. It is admitted that they might have brought an ejectment the following day, and at any time before twenty one years had expired from *Whitsuntide* 1818. But how could the right of entry, which subsisted from *April* 1839 to *Whitsuntide* 1839, be then barred? The right of entry in respect of which they entered in *July* 1852 first accrued in *April* 1839, and would not be barred till *April* 1859.

The nature of the holding subsequent to the time when the plaintiff was turned out of possession in *April*

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1839 seems for this purpose to be wholly immaterial. Whether the plaintiff during the interval was tenant at will, or tenant at sufferance, or a mere trespasser, nothing appears to abridge the period of twenty years during which the right of entry might be exercised from the time when it first accrued.

The plaintiff's counsel rely upon the 7th section of the statute, which enacts "that when any person shall be in possession" "as tenant at will, the right of the person entitled subject thereto" "shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." And it is contended that here the tenancy shall be deemed to have expired at *Whitsuntide* 1819. Another construction of the statute is, that this determination of the tenancy at the expiration of one year after its commencement is only to be deemed to have taken place where there has been no actual determination of the tenancy by the landlord before the Statute of Limitations has run. If there has been no actual determination of the tenancy by the landlord, and the tenant has continued in possession twenty one years or upwards, the tenancy in point of law shall be deemed to have determined at the expiration of one year next after the commencement of such tenancy. After the expiration of twenty one years of a continuous tenancy at will, if the landlord were to enter, no subsequent right of entry having accrued to him, this entry would not be within twenty years next after the time at which the right to make such entry first accrued, and would therefore be unlawful: according to sect. 34 of the statute his right

of entry would be "extinguished." It is difficult to contend that, universally, every tenancy at will shall be deemed to have expired by operation of law at the expiration of one year after its commencement: and the more reasonable construction to put upon the enactment might have been, that, where there has been no actual determination of the tenancy by act of the parties within twenty one years, it shall be deemed to have determined at the expiration of the first year; making an occupation of twenty one years without payment of rent a bar: but, where there has been an actual determination of the tenancy within that period, whereby a new right of entry accrues, this clause of the statute shall have no operation, "such tenancy" being supposed by the statute to continue till the right of entry is barred.

In the present case there was an actual determination of the tenancy by the act of the overseers in *April* 1839, when they took possession: and the right of entry accrued to them under which they entered, as they lawfully might, in *July* 1852. What happened subsequently to the time when the plaintiff resumed the occupation of the cottage in *April* 1839 seems to be wholly immaterial, so that the overseers had not in the interval done any thing to prejudice the right of entry which then vested in them. If he had never resumed the possession of the cottage after he was dispossessed in *April* 1839, could it have been said that, when *Whitsuntide* 1839 arrived, he had acquired the fee simple in the cottage by reason of the tenancy at will being deemed to have determined at *Whitsuntide* 1819? In what better situation can he be, he having been in possession either as a mere trespasser or as a tenant at sufferance? It is admitted that he would have had no title had the jury

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found that his subsequent occupation was under a new tenancy at will. But how would this at all have affected the new right of entry, which had accrued in *April* 1839? An attempt was made to do away with the effect of what there happened, by resorting to sect. 10 of the statute, which enacts "that no person shall be deemed to have been in possession of any land within the meaning of this Act *merely* by reason of having made an entry thereon." But this evidently applies to a *mere entry*, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession. In the present case, possession was actually taken by the overseers *animo possidendi*: and whether possession was retained by them an hour or a week must for this purpose be immaterial. They were lawfully in of their fee simple title; and by nothing that had previously happened could their right, in respect of the Statute of Limitations, be at all prejudiced.

A number of cases were cited in the argument, to shew that, if, after the determination of the tenancy at will independently of the statute, the tenant continues in possession at sufferance till the expiration of twenty one years from the commencement of the tenancy, the statute is a bar. We do not consider it necessary on this occasion to examine these cases: and it may be too late now to consider, except in a Court of Error, whether, where the tenant has remained in possession continuously for twenty one years, the tenancy at will being determined during that time by an act of the landlord without his actually having been in possession, there be any ground for the distinction as to the operation of the

statute between a subsequent tenancy at sufferance and a new tenancy at will, which is allowed to create no bar. But, without conflicting with any prior decision, we think that in this case, by reason of the possession of the overseers in *April* 1839, we are bound to decide in their favour. If it were assumed that a tenancy at will cannot now subsist for more than one year, and that a right of entry in consequence did accrue to the overseers at *Whitsuntide* 1819, it is quite clear that a new and additional right of entry accrued to them in *April* 1839; and it is equally clear that this is the right of entry which they must be supposed to have exercised in *July* 1852. Had there been an issue here, as to whether the defendants entered within twenty years next after their right of entry first accrued, although they should be supposed to have had a right of entry at *Whitsuntide* 1819, still, according to our recent decision in *Keyse v. Powell* (a), the right of entry relied upon by them in pleading must be taken to be that which accrued in *April* 1839; and the defendants would be entitled to a finding that it first accrued to them within twenty years.

We are therefore of opinion that the verdict for 20*l.* damages to the plaintiff in respect of the trespass to the cottage must be set aside, and that the issues depending on the title to the cottage must be found for the defendants.

Rule accordingly.

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(a) Ante, p. 132. 147.

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The QUEEN against The Mayor, Aldermen and
Citizens of the City of NEW SARUM.

The city of *S.* in the county of *W.* had, by charter of *Ja.* 1., a gaol, and quarter sessions. By a local Act, 25 *G.* 3. c. 93., the city was required to pull down and rebuild their gaol, and, till it was rebuilt, the city prisoners were to be committed to the gaol of the county of *W.*, the city paying for their maintenance as the justices of *W.* might direct. By a subsequent local Act, 39 & 40 *G.* 3. c. liii., reciting the former Act, that it was not expedient to rebuild the city gaol, that permission had been asked and obtained from the county justices to continue to commit to the county gaol, and that *R.* had proposed, by way of compensation, to grant to the justices a piece of land for an addition to the gaol, the clauses of stat. 25 *G.* 3. c. 93., requiring the city to build a gaol, were repealed; the piece of land was vested in the High Sheriff of *W.* for the time being; and the prisoners were in future to be committed to the county gaol. No express provisions were made as to their maintenance.

By the Municipal Corporation Act the bounds of the city of *S.* were enlarged.

Held: that the local acts did not amount to a special contract between the county and city as to the maintenance &c. of prisoners within the meaning of stat. 5 & 6 *Vict.* c. 98. s. 18. *Seemle*, that, if it had amounted to such a contract between the county and the ancient city, it would not have been one relating to the prisoners committed from the enlarged city.

Therefore, on a mandamus commanding the city to pay a rateable proportion of the expenses of the gaol, under stat. 5 & 6 *Vict.* c. 98., a return relying on these Acts as a special contract was held bad, and a peremptory mandamus awarded.

MANDAMUS to the Mayor, Aldermen and Citizens
of the City of *New Sarum*, in the county of *Wilts.*

Reciting: that *New Sarum*, being a borough named in Schedule (A.) to stat. 5 & 6 *W.* 4. c. 76., duly obtained, upon the petition of the council of the borough, a grant of a separate court of Quarter Sessions: that, by stat. 2 & 3 *W.* 4. c. 64., certain parts of the county of *Wilts.*, not then within the city of *New Sarum*, were as to the election of members of Parliament included within the limits of the said city; and that, by stat. 5 & 6 *W.* 4. c. 76. (s. 7.), it was provided that the metes and bounds of the city should thereafter be the same, for all purposes, as they were by stat. 2 & 3 *W.* 4. c. 64. for the purposes of that Act. Suggestions: That there was no gaol for the city, and that, ever since the grant of a separate court of Quarter Sessions, the prisoners, committed for offences arising within the city, have been sent to the

gaol of the county of *Wilts*; and that there had been no special contract between the city and county, or the council of the city and the justices of *Wilts*, for the support and maintenance, or for the conveyance, transport, maintenance, safe custody and care, of the prisoners committed to the county gaol from the city or relative thereto: That the visiting justices of the county gaol caused an account to be made out and rendered to the town clerk, pursuant to stat. 5 & 6 *Vict. c. 98. s. 21.*, of the expenses of the conveyance, transport, maintenance, safe custody and care of the city prisoners up to 29th *September* 1851, at the average daily cost of each prisoner according to the whole number of prisoners confined in the gaol, including in such expenses "all salaries of officers, and all expenses of repairs, alterations, additions and improvements in and to the said gaol:" That the amount was disputed, and referred to a barrister, appointed by the Judge of Assize, who by his award determined the amount at 231*l.*, which was demanded from the town council: And that another similar account of the expenses, up to 31st *March* 1852, amounting to 329*l.* 18*s.* 8*d.*, was rendered, and payment demanded: but neither sum was paid. The writ then commanded the defendants to pay those sums, and, if need was for that purpose, to make a rate in the nature of a city rate: or signify cause &c.

Return: That, long before the passing of either of the Acts of Parliament in the writ mentioned, or of either of the Acts of Parliament in the return mentioned, the citizens of the city of *New Sarum* were incorporated by the name of *The Mayor and Commonalty of the City of New Sarum*, with perpetual succession; and His Majesty King *James* 1st, by a charter, granted to the

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Mayor, Aldermen and Recorder of the said city power to enquire, hear and determine, within the said city, all manner of murders, felonies, trespasses and offences, and all other things whatsoever, from time to time within the said city and the liberties and precincts thereof arising and happening, which to the office of a justice of the peace in any manner might belong, or which before justices of the peace might be enquired of, heard or determined, together with the correction and punishment thereof, and all other things to do and execute within the city aforesaid as fully, and in as ample a manner and form, as the justices of the peace of the county of *Wilts* or elsewhere; with a non intro-mittant clause. That, after the grant aforesaid, there had been and was a common gaol within and for the city of *New Sarum*; but, the same having become ruinous and insecure and too small, and being inconveniently situated, by stat. 25 *G. 3. c. 93. (a)* the said

(a) "For the removal and rebuilding of the council chamber, Guildhall, and gaol, of the city of *New Sarum*; and for ascertaining the tolls of the market, and regulating the chairmen within the said city."

By sect. 3 the Corporation are to take down the existing gaol. By sect. 6 they are to erect a new one.

Sect. 7 enacts: "that until the said new gaol shall be erected, built and completed, all such felons, debtors, and other persons within the said city, and the close thereof, who already are, or by law shall be liable, or ought to be committed to the common gaol of the said city, shall and may when and as often as occasion shall require, be committed by the justices of the peace for the said city and the close thereof, to, and shall be confined in, the common gaol of the county of *Wilts*" as they would be in the new gaol when completed. "And the said Mayor and Commonalty shall make such pecuniary satisfaction for the maintenance and keeping of such persons so liable to be confined in the gaol of the said county as aforesaid, and such satisfaction shall be paid to such person or persons, and applied for such purposes, as the justices of the peace for the said county shall at their Quarter Sessions, from time to time, direct or appoint."

Mayor and Commonalty of the said city were authorized and required to cause the said common gaol to be taken down, and a new common gaol to be erected and built in the manner mentioned in the said Act: and it was by the said Act provided that, until such new common gaol should be completed, all such felons, debtors and other persons within the said city, who already were or by law should be liable or ought to be committed to the common gaol of the said city, should be committed to and confined in the common gaol of the county of *Wilts* on the terms in the said Act mentioned: That, after the passing of the said Act, the said old common gaol was taken down; but no new common gaol was erected and built by the said Mayor and Commonalty under and by virtue of the said Act: That afterwards, by stat. 39 & 40 *G. 3. c. liii. (a)*, pro-

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(a) Local and personal, public: "For repealing so much of an Act, passed in the 25th year of the reign of his present Majesty, intituled, 'An Act for the removing and rebuilding of the council chamber, Guildhall and gaol of the city of *New Sarum*, and for ascertaining the tolls of the market, and regulating the chairmen within the said city,' as requires the Mayor and Commonalty of the city of *New Sarum* to build a new gaol within the said city, or the suburbs or precincts thereof; and for authorizing the commitment of felons and other persons within the limits of the said city and the close thereof, to the gaol of the county of *Wilts*; and for explaining and amending the said Act." Sect. 1, after reciting, amongst other things, the whole of stat. 25 *G. 3. c. 93.*, and that the old borough gaol had been pulled down, but the new one not built; and that it was expedient that the city prisoners should be confined in the county gaol, and that "application hath been made to His Majesty's justices of the peace in and for the said county of *Wilts*, assembled at the general quarter sessions of the peace for the same, that is to say, at four successive general quarter sessions of the peace holden in and for the said county in the said city of *New Sarum*, and the towns of *Warminster*, *Marlborough*, and *Devizes* respectively, for permission and liberty to commit to and confine in the said county gaol, such felons, debtors, and others; and such permission and liberty have been given and confirmed at each and every of the said four general quarter sessions of the peace for the said county, as by the records

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vision was made for the commitment and confinement of persons committed for offences arising within the

thereof appear: and whereas the said *Jacob Earl of Radnor* is seized in fee of a certain piece or parcel of land containing one acre or thereabouts, freed of land tax, situate, lying, and being in *Fisherton Anger* aforesaid, and adjoining to the said county gaol, abutting thereon on the north, east against the river *Avon*, south against the king's highway, and west against lands in the occupation of the governors of the *Salisbury Infirmary*, and by way of compensation and satisfaction for such permission and liberty, the said Earl hath proposed to the said justices of the peace for the said county, in order to make the said county gaol more commodious, to give and grant the fee simple and inheritance of and in the said piece or parcel of land to the uses, and that the same should be vested in manner herein-after mentioned; to which proposal the said justices have agreed: and whereas doubts have arisen respecting the powers and authorities given in and by the said recited Act to the justices of the peace in and for the said city and close respectively, and to the said Lord Bishop and his officers and ministers, or the officers of the said court, for committing and confining of felons and debtors and other persons in the said county gaol; and further powers and authorities are necessary to render the same effectual" enacts, "that from and immediately after the passing of this Act, the clauses in the said recited Act contained, requiring the Mayor and Commonalty of the said city of *New Sarum* to erect and build a gaol within the said city or the suburbs or precincts thereof, shall be repealed, and the same are hereby repealed accordingly."

Sect. 2. "That, from and after the passing of this Act, the said piece of ground in *Fisherton Anger*, so proposed to be given and granted by the said Earl, shall be and the same is hereby vested in the High Sheriff of the said county of *Wilts* for the time being, in trust for the same uses and purposes to which the said gaol at *Fisherton Anger*, and the land thereto belonging, is and are subject, and subject to all the laws now in being, or which may hereafter be enacted for the management, direction, ordering, and government of the said gaol of the said county, and the county gaols of this kingdom in general."

Sect. 3. "That, from and immediately after the passing of this Act, all such felons and other persons within the said city, and the close thereof, who already are, or by law shall be liable or ought to be committed to any gaol or place of security, by any justice or justices of the peace of the said city, or by any justice or justices of the peace of the said close respectively, shall and may, when and as often as occasion shall require, be committed by such justice or justices respectively to, and shall be received and con-

said city to the common gaol of the said county of *Wilts*, in the manner in the said Act mentioned. And a special provision and a special contract was in and by virtue of the said Act made between the said city and the said county relative to the said prisoners as in the said Act mentioned. And that, from the passing of the said Act hitherto, the said prisoners have been committed to the said common gaol of the said county under and by virtue of the provisions of the said Act: and from the time of the passing of the said Act up to the passing of stat. 5 & 6 *Vict. c. 98.*, and from thence up to the time of the visiting justices within mentioned making out the account in writing within mentioned, the said city and the said county have acted in all things relative to the said prisoners upon the special

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fined in, the said county gaol now erected (or which may at any time hereafter be erected) at *Fisherton Anger*, in such and the like manner, to all intents and purposes, as felons or other prisoners committed by justices of the peace for the said city or close respectively could or might have been confined, in any gaol or bridewell erected within the said city, or the suburbs or precincts thereof, under and in pursuance of the said recited Act."

Sect. 7. "That such and the same allowance or pecuniary satisfaction shall be made by the said city and close respectively, for the maintenance and support of the several felons or other prisoners that shall be committed by the justices of the peace in and for the said city or close respectively, as persons in the like situation respectively are entitled unto who are committed by the justices of the peace for the said county."

Sect. 9. That the "charges and expenses of maintaining the felons and prisoners who shall be from time to time committed by the justices of the peace of" the close (a liberty within the city) "shall be paid, borne, and defrayed by and out of the poor rates made on the inhabitants of the said close."

Sect. 12. That, if the gaol should be enlarged, one tenth part of the cost should be borne by the city.

No express provisions were made as to the maintenance of prisoners committed from the city.

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provision and contract mentioned and contained in the stat. 39 & 40 G. 3. c. liii.: that the city has always been and still is ready to abide by and perform all things in the said last mentioned Act contained; of which all persons in the said county of *Wilts* have always had notice. Demurrer. Joinder.

The demurrer was argued in last *Trinity* Term (a).

Smirke, for the Crown. Stat. 5 & 6 Vict. c. 98. s. 18. enacts: "that in every borough to which a separate Court of Sessions of the Peace hath been or shall hereafter be granted or purported to be granted, and where the persons committed for offences arising within such borough, have been or shall hereafter be sent to any prison of the county in which such borough is situated, and that no special contract shall be subsisting between such borough and county relative to the said prisoners," the council shall pay the justices of the county the expenses. The question in the present case is, whether there is a special contract between the borough of *New Sarum* and the county of *Wilts*: and the defendants say that the local Act 39 & 40 G. 3. c. liii. is such a contract. There could be no contract between a borough and a county at common law. The first Act authorizing any such contract is stat. 5 G. 4. c. 85. Sect. 1 of that Act enacts: "that it shall be lawful for the justices of the peace, or any two of them, or for other persons having the government or ordering of any gaol or house of correction, in any city, town, borough, port or liberty, to contract with the justices of the peace, having authority or jurisdiction in and over any gaol or house of

(a) June 8th. Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

correction of the county, riding or division, wherein or whereto such city, town, borough, port or liberty is situate or adjacent, or with any two of them, for the support and maintenance, in such last mentioned gaol or house of correction, of any prisoners committed thereto, from such city, town, borough, port or liberty; provided that no such contract be entered into by any justices of the peace of any county, riding or division, without an order for that purpose being made at some general or quarter sessions, or gaol sessions, having jurisdiction in that behalf, nor by the justices or other persons having the government of the prison of any such city, town, borough, port or liberty, without an order for that purpose being made at the sessions thereof; and every such contract may either be perpetual, or limited to a certain term of years, as the parties shall mutually agree; and during the existence of such contract, every prisoner who would otherwise be confined in the gaol or house of correction of the city, town, borough, port or liberty, so contracting, may be lawfully committed or removed to and confined in the gaol or house of correction so receiving him or her under such contract; and all prisoners so confined by contract, whether before or after trial, shall be subject in all matters and things to the same rules and regulations as if they were committed thereto by any of the justices of the county, riding or division; and if committed before trial, shall be triable and tried in the same manner as if their offences had been committed in a part of the county, riding or division, not within the city, town, borough, port or liberty from whence such prisoners shall come; save only, that if the gaol or house

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of correction so receiving under contract a prisoner committed for trial, shall be situate within two miles of the usual place of trial of the city, town, borough, port or liberty wherein the offence charged against such prisoner shall be alleged to have been committed, it shall be lawful to try such prisoner in the manner heretofore accustomed, and for the magistrates or other proper officer of such city, town, borough, port or liberty, to direct the removal of such prisoner for trial, and to do all other acts necessary for such trial, or consequent thereon." Then stat. 5 & 6 *W. 4. c. 76.* has provisions for the payment of expenses of prosecutions at Assizes, and, in sect. 114, has this proviso: "that nothing herein contained shall be construed to alter or restrain the powers given by" stat. 5 *G. 4. c. 85.* "of contracting with the justices of the peace having authority or jurisdiction in and over any gaol or house of correction of the county wherein or where such borough is situated, or whereto it is adjacent, for the conveyance, support, and maintenance in such last mentioned gaol or house of correction of prisoners committed thereto from such borough, save only that all such powers shall after 1st *May* 1836 be vested in the council of such borough" "and in none other." Stat. 5 & 6 *Vict. c. 98.* is a gaol Act, and must be read with reference to the prior gaol Acts: when, in sect. 18, reference is made to a "special contract" "subsisting between such borough and county relative to the said prisoners," it must mean a special contract of the kind authorized by the previous gaol Acts. A private Act is not a contract in the ordinary use of language: it is perhaps in some respects analogous to a contract, though that has been

questioned; *York and North Midland Railway Company v. The Queen* (a): but, even if stat. 39 & 40 G. 3. c. liii. could be considered as a special contract relative to the prisoners committed from the city as it then stood, that could not apply to the prisoners committed from the enlarged city.

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Crowder, contra. Stat. 5 G. 4. c. 85. was, no doubt, the first general Act which gave a general power to make contracts relative to prisoners; but there is nothing in stat. 5 & 6 Vict. c. 98. to restrict the terms "special contract" to contracts made under that Act. There may be many special contracts made before that Act, and sanctioned by special Acts. The Legislature, in stat. 5 & 6 Vict. c. 98. s. 18., intended to save all valid contracts of whatever kind. Stat. 39 & 40 G. 3. c. liii., when looked at, appears to be a legislative sanction of a very special contract. Sect. 1. recites that application had been made to the justices, at four successive quarter sessions, for permission and liberty to commit to and confine in the county gaol the city prisoners; and that the Earl of *Radnor*, Recorder of the city, had, "by way of compensation and satisfaction for such permission and liberty," proposed to the justices to grant a piece of land to make the county gaol more commodious; "to which proposal the said justices have agreed." This is surely a contract for a consideration. The enactments carry it out, relieve the city from the obligation to make a gaol, vest the land in the High Sheriff for the time being, and provide that the city prisoners shall be in future committed to the county gaol. The Legislature, in stat.

(a) 1 E. & B. 858. 864.

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5 & 6 Vict. c. 98., do not repeal this Act in terms: but, if the prosecutors are right, the Act is really repealed; for the city must contribute to the repairs of the county gaol, though the county keep the land; but, if the local Act be read as a legislative sanction of a special contract, that is not so.

Smirke was heard in reply.

Cur. adv. vult.

COLERIDGE J. now delivered the judgment of the Court.

This was a writ of mandamus, directed to the defendants, by which they were commanded to pay to the prosecutor, or other person appointed by the justices of *Wiltshire*, certain ascertained sums of money, alleged to be due in respect of the conveyance, transport, maintenance, safe custody and care of prisoners committed by the Recorder and justices of *New Sarum* to the gaol and house of correction for the county of *Wilts*. In the ascertainment of these sums were included, among other things, a proportionate share of "all expenses of repairs, alterations, additions and improvements in and to the said gaol." And the contest between the city and county turns upon this: the former contending that, under the circumstances, they are not liable to make any contribution towards the repair or alterations of the fabric, or additions thereto. The magistrates for the county have proceeded under stat. 5 & 6 Vict. c. 98. s. 18. When that Act passed, stat. 5 G. 4. c. 85. had been in force many years; and under it special contracts had been made, between counties on the one hand and cities or boroughs on the other, for the maintenance of

prisoners, committed from the latter, in the gaols or house of correction of the former. These it was intended to respect, whatever might be the terms: but, when they did not exist, the 18th section provides for a system, perfectly equitable, that the counties should receive from the cities or boroughs an exactly proportionate share of the whole expense, including therein repairs, alterations or additions to the fabric of the prison; the proportion to be arrived at by ascertaining the actual expenses of every prisoner sent. It could not be, therefore, nor was it, disputed that the prosecutors were right in their demand, unless there were a special contract subsisting between the county and the city relative to the prisoners committed from the city. If there were, the section in question does not apply: and, Whether there were or not, within the meaning of that section of the statute, is the question upon the answer to which the decision of this case will depend. And we are of opinion that there is not.

The defendants contend for the affirmative; and they rely on the provisions of two local acts, one stat. 25 *G. 3. c. 93.*, and the other stat. 39 & 40 *G. 3. c. liii.* This latter recites and repeals so much of the former as obliged the city to build, maintain and repair a good and proper gaol for their prisoners; and provided that, until it should be built, the city prisoners might be committed to the common gaol of the county, the Mayor and Commonalty making pecuniary satisfaction for the maintenance and keeping of such prisoners. It further recites that application had been made to four successive quarter sessions for the county for continued permission to confine the city prisoners in the county gaol, which had been given; and that the Earl of *Radnor*

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had proposed, by way of compensation and satisfaction for such permission, in order to make the county gaol more commodious, to grant the fee simple of a piece of land to the High Sheriff for the time being; to which proposal the justices for the county had agreed. By the second section, this piece of ground is vested in the High Sheriff for the time being, in trust for the same uses and purposes to which the existing county gaol is subject: and it is also made subject to all the laws then or thereafter to be enacted for the management of the county gaol and the county gaols of the kingdom in general. The third and three following sections legalise the committal of city prisoners and debtors to the county gaol: and the seventh enacts that such and the same allowance or pecuniary satisfaction shall be made by the city for the maintenance and support of the several felons, or other prisoners so committed, as *persons* in the like situation are entitled to, who are committed by county justices. The 9th section provides that the charges of maintaining the felons and prisoners who shall be from time to time committed from the close, a liberty within the city with separate justices, shall be paid out of the poor rates made on the inhabitants of the close. The 12th section enacts that, if at any time the county justices shall declare it to be necessary and expedient to enlarge the cells, or to build new cells in the county gaol, and shall direct the same accordingly, then the Mayor and Commonalty shall pay to the county treasurer one tenth part of the ascertained costs and expenses. It will be observed that this Act of Parliament does not, in any of the sections we have now abstracted, make any provision directly or indirectly for any payment to the county justices for the maintenance and support of the

city prisoners; nor does any other section of the Act apply to this matter. But, if the unrepealed provision of stat. 25 *G. 3. c. 93.* be relied on, that merely enacted that the Mayor and Commonalty should make such pecuniary satisfaction for the maintenance and keeping of their prisoners, and should pay it to such person as the county justices should at their quarter sessions from time to time direct and appoint. It would be doing a violence to the language of stat. 5 & 6 *Vict. c. 98.* to consider this provision as a special contract subsisting between the county and city. This language is in some respects indefinite: but it evidently refers to special contracts made under stat. 5 *G. 4. c. 85.* between the magistrates of cities and of counties for the support and maintenance of city prisoners in county gaols, which contracts, by the 1st section of that Act, might either be perpetual, or limited to a certain number of years, as the parties should mutually agree. Such a contract as this would speak for itself: and it was not intended to interfere with it during the time of its subsistence. But stat. 25 *G. 3. c. 93.* contemplated only the providing for a temporary want, until the city had rebuilt its gaol, which that Act imposed on it the necessity of doing: and the provision was not by way of contract at all; the county was compelled to receive the prisoners; and the city was compelled to pay a recompense, not a recompense agreed on between them, but such as the county magistrates should direct. Nor is this the only difficulty in the way of the defendants; for the contract, which is to prevent the operation of stat. 5 & 6 *Vict. c. 98. s. 18.*, must obviously be one between the same bodies as those which in the absence of a contract will fall under its

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provisions. But the city of *New Sarum* is not the same in extent now as before the passing of the Municipal Reform Act; for its boundaries are extended to the Parliamentary limits; and the Corporation, representing this enlarged area, has neither directly or indirectly been party to any contract with the county. Some reliance was placed on the grant of land by the Earl of *Radnor*, for the permission given by the county permanently to commit the city prisoners to the county gaol; that, however, cannot operate by way of contract for their maintenance and support. Nor, indeed, was it contended that it could; but it was said to have the effect of casting on the county the obligation to repair and support prison accommodation for the city prisoners, without any further contribution from the city for repairs or additions. Even if in itself it would furnish ground for such an inference, which we think would be a strained one, it would not affect our decision, because the 18th section must apply, unless there were a special contract subsisting such as stat. 5 G. 4. c. 85. contemplated: that is, a contract for the maintenance and support of the prisoners; whereas this could be no more than a contract for the maintenance of the prison. But this part of stat. 39 & 40 G. 3. c. liii. shews that the arrangement under stat. 25 G. 3. c. 93. was no longer continued: it had been temporary in its first creation; and committals to the county prison would have come to an end as soon as the city was relieved from the rebuilding of their own gaol, had not the county justices agreed on permitting them still to take place, on application having been made to them at four successive Quarter Sessions. The result is, that under neither of the local Acts do

the defendants, on whom the onus lies, establish such a subsisting contract as stat. 5 & 6 *Vict. c. 98. s. 18.* speaks of: that section therefore applies; and the defence fails.

Our judgment therefore will be for the Crown.

Judgment for the Crown.

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In the matter of a plaint, The Earl of HARRINGTON, plaintiff, and DAVID RAMSAY, defendant.

Saturday,
June 25th.

BRAMWELL, in last Term (a), moved for a prohibition in the above plaint, directed to the judge of the county court of *Middlesex* holden at *Brompton*. The plaint was for the recovery of possession of land which had been let by the Earl of *Harrington* to Mr. *Ramsay* for a term which had expired. The original rent was under 50*l.*; and there was no fine; but the present value was above 50*l.*

A. brought a plaint in the county court against B. to recover possession of land demised by A. to B. for a term which had expired. There had been no fine; and the rent had been under 50*l.*; but the annual value of the premises was above 50*l.* On a rule for a prohibition:

Bramwell. A similar rule obtained in the Exchequer has been this morning discharged (b). [Lord *Campbell* C. J. It may be worth considering, when the next step is taken to reform the law, whether a more convenient mode of appeal might not be devised. But there is no doubt that, at present, in prohibition and on habeas corpus, the decision of one Court refusing a rule,

Held, by Lord *Campbell* C. J. and *Erle* J., that stat. 9 & 10 *Vict. c. 95. s. 122.* gives the county court jurisdiction if either the rent or the value fall short of 50*l.*

Held, by *Crompton* J., that it gives the county court jurisdiction only where neither the rent nor the value exceeds 50*l.*

A rule for a prohibition was discharged.

(a) June 13th. Before Lord *Campbell* C. J., *Erle* and *Crompton* Js.

(b) *In re Earl of Harrington v. Ramsay*, 8 *Exch.* 879.

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on which error cannot be brought, is not binding on another Court, though only of coordinate jurisdiction.] The question turns on the construction of stat. 9 & 10 Vict. c. 95. s. 122., which enacts "that when and so soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit," the county court shall have jurisdiction. This enactment has been considered in *Crowley v. Vitty (a)*, in which, the rent having been originally 52*l.*, there was an agreement to take 40*l.*: it turned out that the agreement was not binding, so that the rent was still 52*l.*; and, upon that, *Parke B.* said: "The rent being above 50*l.*, it is unnecessary to consider the point with reference to the value:" and the writ was granted: that was therefore a decision that, if either rent or value is above 50*l.*, the county court has no jurisdiction. In *Fearon v. Norvall (b)* *Patteson J.* expressed an opinion to the contrary; but it was a dictum merely, as the point did not arise in that case. The Court of Exchequer decided in the present case after much hesitation. [The Court inquired what were the reasons given by the Court of Exchequer. *Wise*, who had been counsel in the cause, read his notes, by which it appeared that the Court of Exchequer, after discharging the rule on *Thursday June 11th*, considered whether the case should be reargued, on the ground that they doubted if they were right, and, on *Saturday June*

(a) 7 *Exch.* 319, 322.(b) 5 *D. & L.* 445.

13th, declined to hear it reargued, giving as their reasons that, though they thought the Legislature could not have intended to give the county court jurisdiction in such a case, the words were too clear to admit of any doubt.]

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A rule *Nisi* being granted,

Wise shewed cause in the first instance: and *Bramwell* and *F. J. Smith* were heard in support of the rule. The authorities already cited were commented on. The counsel on both sides argued on the question whether the words used by the Legislature in stat. 9 & 10 *Vict. c. 95. s. 122.* in their grammatical meaning (as suggested by the counsel opposing the rule) imposed an alternative condition, giving the county court jurisdiction in either event, or (as suggested by the counsel supporting the rule) a double condition giving jurisdiction only if both were fulfilled. The more important arguments are noticed in the judgments.

Cur. adv. vult.

Lord CAMPBELL C. J. now said: In this case the Court who heard the argument are divided in opinion. My brother *Erle* authorizes me to say that he concurs in the judgment which I am about to deliver. My brother *Crompton* dissents, for reasons which he will state.

Lord
Campbell C. J.

I am of opinion that the Court of Exchequer has put the right construction on the 122nd section of stat. 9 & 10 *Vict. c. 95.* The object was to give a summary remedy in the county court to the landlord upon a holding over by the tenant, "where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year." In this

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case, the annual value of premises so hold over did exceed 50*l.*; and the rent did not exceed 50*l.* The defendant contends that the county court has not jurisdiction in such a case if either the rent or annual value exceeds 50*l.* But I do not think that this is the natural or grammatical meaning of the words employed by the Legislature. Confusion arises from the sum of 50*l.* being fixed by the aid of a negative, which leads at first sight to the inference that there is a negation both as to value and rent, and that "*or*" is to be read "*and*." But, in truth, the "*not*" does not refer to "*or*," and, coupled with "*exceed*," is used affirmatively to ascertain the limit within which jurisdiction is given to the county court. The effect seems to be the same as if the language had been affirmative in appearance as well as in reality; "where the value of the premises or the rent payable in respect of such tenancy *was less than 50*l.*,*" or "*fell short of 50*l.*,*" or "*amounted to not more than 50*l.*:*" on each of these suppositions the meaning must be the same if the words fixing the maximum were inserted first after "the value of the premises," and again after "or the rent payable in respect of such tenancy;" in which case there would not be two conditions to be fulfilled, and on either condition it seems quite clear that the county court would have jurisdiction. It is not for us to enquire what were the reasons of the Legislature for so giving jurisdiction to the county court: but surely there would be no such absurdity in this jurisdiction as to justify us in straining the language employed in the Act of Parliament. In rare instances, where the value greatly exceeds the rent, inconvenience may arise from giving this summary jurisdiction to the county court; but most serious inconvenience would constantly arise if

the tenant might question the jurisdiction of the county court on the ground that, although his rent did not exceed 50*l.*, the premises are of a higher annual value. The Legislature probably did not contemplate that value was to be taken into consideration where there was a fixed rent, and meant that value should be regarded only where there was no fixed rent. In *Crowley v. Vitty* (a) *Parke B.* is reported to have said that the county court has no jurisdiction if the rent is above 50*l.*: but the question we have to consider was not much discussed there; and the distinction between *rent* and *value* was not taken. In *Fearon v. Norvall* (b) *Patteson J.* declared himself to be of the contrary opinion; and to this opinion, upon a motion for a prohibition in this very case, the Judges of the Court of Exchequer unanimously adhered after time taken to consider. I therefore come to the conclusion that the county court has jurisdiction, and that this rule for a prohibition ought to be discharged.

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CROMPTON J. This was an application for a prohibition to the judge of a county court, to prevent his proceeding in a case between landlord and tenant, for the recovery of premises under the 122nd section of the County Court Act, 9 & 10 *Vict. c. 95*. It appeared that the rent of the premises was under 50*l.*, and that no fine had been paid, but that the value of the premises did exceed 50*l.* by the year: and the general question arises, Whether the county court has jurisdiction under the above section where the yearly rent is less than 50*l.* though the yearly value be more, or whether either the rent or value being more excludes the jurisdiction? In the case of

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value" &c. "or the rent" &c. "did not exceed" &c. are to be considered as conferring the jurisdiction in each of these cases, or whether the jurisdiction is not limited by those words so as not to attach in either of the cases pointed out.

It seems to me highly improbable that the Legislature, in a clause limiting this jurisdiction to cases of less yearly value or rent than 50*l*., and where they have guarded against the case of a fine when the rent is under that sum, should have intended to give jurisdiction to an unlimited amount of value, when the rent has originally been under 50*l*., and the yearly value has been much increased, as by building. The provision as to value has probably been inserted to meet cases like the present, by no means uncommon, as where the land has been taken for building purposes at a small rent, and where the value has been much increased beyond the original rent.

We were told in the course of the argument that the Court of Exchequer on the present occasion expressed their opinion that the Legislature would not purposely have given such a jurisdiction, but stated that they thought themselves bound by the words of the enactment. The words however seem to me to be quite capable of the construction put upon them by Mr. *Bramwell*, which will carry out the apparent intention of the Legislature to be collected from the Act of Parliament. The Legislature have used words in the negative, defining and limiting and describing the cases in which there is to be jurisdiction: and it seems to me that these words may be well read as meaning that the jurisdiction is to attach only when neither the value nor the rent exceeds 50*l*.; the words, "not" and "or," meaning "nor," and the sense being the same as if the expression had been "but not when" or "except when"

the value or the rent exceeds 50*l*., or as if the expression had been "in cases of rent or value not exceeding 50*l*;" and that the effect is that there is to be jurisdiction neither in the one case nor in the other. I think that the meaning is that the jurisdiction is not to attach either where the value exceeds 50*l*. or where the rent exceeds that sum, and not even where it falls short of that sum, if there is a fine taken.

It was suggested, in the course of the argument, that the sentence might be turned into an affirmative one, as if instead of the words "did not exceed" the words were "falls short of" or "amounted to less than" or "to no more than:" but I do not think that we have any sufficient ground to make such an alteration, as it seems to me from the structure of the sentence, and from the nature of the subject, and the rest of the Act, that the use of the negative expresses the intention of the Legislature to exclude the jurisdiction, which the other construction would defeat. I do not agree to this construction, because I think that it is altering the form of expression so as to defeat what I think the probable intention of the Legislature, and because I think the use of the negative carries out the object of the Legislature; and I cannot alter the form of the clause by changing the negative into an affirmative, when I think that the negative carries out the meaning of the Legislature. It was urged by Mr. *Wise*, in shewing cause, that great inconvenience might arise from the difficulty of ascertaining the value; but according to his own argument the value would be one criterion for ascertaining if there was jurisdiction; and in such cases as *Crowley v. Vitty* (a), not however likely often to occur, such a question might arise where the value is supposed to be

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less, and the rent more: but the better answer would probably be that very nice questions, of residence, locality and amount, constantly and necessarily arise under this Act, which must be ascertained by parol evidence for the purpose of deciding whether there is or is not jurisdiction in the county court: and I do not see that there is any peculiar difficulty in ascertaining the value to be above or under the yearly amount of 50*l*. Being of opinion that the Legislature meant by these words to exclude from the jurisdiction of the county courts cases where the value is of the larger amount, and the construction of the clause, though it may be obscure and doubtful, appearing to me to be such as is capable of carrying out this meaning, I think that I ought to express my opinion that a prohibition should go, though I need hardly say that I do so with the most sincere diffidence, when I find that I differ from the rest of the Court who heard this case.

Rule discharged.

The Duke of Devon & Cornwall v. The Earl of Devon 11 C.B. (N.S.) 152

Saturday,
June 25th.

ALBERT HOCHSTER *against* EDGAR FREDERICK
DE LA TOUR.

Declaration
on an agree-
ment to employ
plaintiff as a
courier, from
a day subse-
quent to the

DECLARATION: "for that, heretofore, to wit on
12th *April* 1852, in consideration that plaintiff, at
the request of defendant, would agree with the defend-

date of the writ: averment that plaintiff, from the time of the agreement, till the refusal by defendant after mentioned, was ready and willing to perform his part of the contract: Breach, that, before the day for the commencement of the employment, defendant refused to perform the agreement, and discharged plaintiff from performing it, and wrongfully wholly put an end to the agreement. On motion in arrest of judgment:

Held: that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement. That it sufficiently appeared, on the face of this declaration, that there was on the part of defendant, not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to plaintiff, on which plaintiff was entitled to act; and consequently that plaintiff was entitled to judgment.

ant to enter into the service and employ of the defendant in the capacity of a courier, on a certain day then to come, to wit the 1st day of *June* 1852, and to serve the defendant in that capacity, and travel with him on the continent of *Europe* as a courier for three months certain from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit" 10*l.* per month of such service, "the defendant then agreed with the plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st day of *June* 1852 for three months" on these terms; "and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay the plaintiff" on these terms: averment that plaintiff, confiding in the said agreement and promise of the defendant, "agreed with the defendant" to fulfil these terms on his part, "and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid." That, "from the time of the making of said agreement of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he the plaintiff was always ready and willing to enter into the service and employ of the defendant, in the capacity aforesaid, on the said 1st *June* 1852, and to serve the defendant in that capacity, and to travel with him on the continent of *Europe* as a courier for three months certain from the day and year last aforesaid, and to start with the defendant on such travels on the day and year last aforesaid,

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at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said 1st *June* 1852, have entered into the said service and employ of the defendant in the capacity, and upon the terms and for the time aforesaid: of all which several premises the defendant always had notice and knowledge: yet the defendant, not regarding the said agreement, nor his said promise, afterwards and *before* the said 1st *June* 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the said 1st *June* 1852 for three months, or on, from or for, any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his the plaintiff's part, and from being ready and willing to perform the same on the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to and determined his said promise and engagement:" to the damage of the plaintiff. The writ was dated on the 22d of *May* 1852.

Pleas: 1. That defendant did not agree or promise in manner and form &c.: conclusion to the country. Issue thereon.

2. That plaintiff did not agree with defendant in manner and form &c.: conclusion to the country. Issue thereon.

3. That plaintiff was not ready and willing, nor did defendant absolve, exonerate or discharge plaintiff from being ready and willing, in manner and form &c.: conclusion to the country. Issue thereon.

4. That defendant did not refuse or decline, nor wrongfully absolve, exonerate or discharge, nor wrongfully break, put an end to or determine, in manner and form &c. : conclusion to the country. Issue thereon.

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On the trial, before *Erle J.*, at the *London* sittings in last *Easter Term*, it appeared that plaintiff was a courier, who, in *April, 1852*, was engaged by defendant to accompany him on a tour, to commence on 1st *June 1852*, on the terms mentioned in the declaration. On the 11th *May 1852*, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on 22d *May*. The plaintiff, between the commencement of the action and the 1st *June*, obtained an engagement with Lord *Ashburton*, on equally good terms, but not commencing till 4th *July*. The defendant's counsel objected that there could be no breach of the contract before the 1st of *June*. The learned Judge was of a contrary opinion, but reserved leave to enter a nonsuit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same Term, obtained a rule *Nisi* to enter a nonsuit, or arrest the judgment. In last *Trinity Term (a)*,

Hannen shewed cause. The breach laid is, that defendant, before 1st *June*, refused to employ plaintiff; and the averments of readiness and willingness are confined to readiness and willingness until the time when defendant refused to perform his contract. It is upon these averments that issues are taken; and, as they are unquestionably proved, there is no ground for the motion

(a) *June 10th*. Before Lord *Campbell C. J.*, *Coleridge*, *Erle* and *Crompton Js.*

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to enter a nonsuit. But the question which arises on the record is a serious one; and it is, whether in law it is possible to break a contract before the day for its performance comes. The cases relied on by the defendant's counsel will probably be *Leigh v. Paterson* (a), *Phillpotts v. Evans* (b) and *Ripley v. McClure* (c). But no one of these is an authority for the defendant. In *Leigh v. Paterson* (a) there was a contract by the defendants to supply goods to be delivered in all *December*. The defendants, on 1st *October*, announced that they would not so deliver: and, on a writ of enquiry to ascertain the amount of damages, the Secondary ruled that the measure of damages was the difference between the contract price and the market price on 1st *October*, when the plaintiffs first knew that the defendants would not fulfil their contract. This was held wrong; and it is clear on principle that it was wrong; for the defendants could not by their refusal cast upon the plaintiffs a duty to go at once and purchase goods before the time when they wanted them; and, unless such a duty was cast upon them, the measure of damages was the pecuniary difference between the state the plaintiffs were in, having their money and not the goods, and that in which they would have been had the contract been fulfilled, and they had at the time of delivery paid the money and received the goods; the damages therefore clearly depended on the market price at the time when the goods ought to have been delivered. *Phillpotts v. Evans* (b) was, as far as the decision went, a precisely similar case; but it must be owned that there are dicta of *Parke* B. in that case which are in favour of the defendant: and in *Ripley v. McClure* (d) *Parke* B.,

(a) 8 *Taunt.* 540.(b) 5 *M. & W.* 475.(c) 4 *Exch.* 345.(d) 4 *Exch.* 359.

in delivering the considered judgment of the Court of Exchequer, says that it was contended by the defendant's counsel that the refusal, on the part of the defendants in that case, to accept the goods, "which was long before the contract to buy become absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted. And we think, that, if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We think that point rightly decided in *Phillpotts v. Evans* (a)." It would seem, from the form of the expressions, that the learned Judge did not mean to decide that a refusal *not* capable of being retracted would not be a breach. If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted: and, accordingly, in *Cort v. Ambergate &c. Railway Company* (b), this Court, after considering the cases, decided that in such a case the plaintiff might recover, though he was no longer in a position to fulfil his contract. That was a contract under seal to manufacture and supply iron chairs. The purchasers discharged the vendors from manufacturing the goods; and it was held that an action might be maintained by the vendors. It is true, however, that in that case the writ was issued after the time when the chairs ought to have been received. In the present case, if the writ had been issued on the 2d of June, *Cort v. Ambergate &c. Railway Company* (b) would have been expressly in point. The question, therefore, comes to be: Does

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(a) 5 M. & W. 475.

(b) 17 Q. B.

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it make any difference that the writ was issued before the 1st *June*? If the dicta of *Parke B.* in *Phillpotts v. Evans* (a) are to be taken as universally applicable, it does make a difference; but they cannot be so taken. In a contract to marry at a future day, a marriage by the man before that day is a breach; *Short v. Stone* (b). The reason of this is, that the marriage is a final refusal to go on with the contract. It is not on the ground that the defendant has rendered it impossible to fulfil the contract; for, as was urged in vain in *Short v. Stone* (b), the first wife might be dead before the day came. So also, on a contract to assign a term of years on a day future, a previous assignment to a stranger is a breach; *Lovelock v. Franklyn* (c). [Lord Campbell C. J. It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in *May* incapacitate him from travelling in *June*? It was possible that he might do so.] It was; but the plaintiff, who, so long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st *June*, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did. In *Planchè v. Colburn* (d) the plaintiff had contracted with defendants to write a work for "The Juvenile Library;" and he was held to be entitled to recover on their discontinuing the publication; yet the time for the completion of the contract, that is for the work being published in "The Juvenile

(a) 5 *M. & W.* 475.(b) 8 *Q. B.* 358.(c) 8 *Q. B.* 371.(d) 8 *Bing.* 14.

Library," had not arrived, for that would not be till a reasonable time after the author had completed the work. Now in that case the author never did complete the work. [Lord *Campbell* C. J. It certainly would have been cruelly hard if the author had been obliged, as a condition precedent to redress, to compose a work which he knew could never be published. *Crompton* J. When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty." This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal. They were all considered in *Elderton v. Emmens* (a). Lord *Campbell* C. J. The counsel in support of the rule have to answer a very able argument.]

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Hugh Hill and *Deighton*, *contra*. In *Cort v. Ambergate &c. Railway Company* (b) the writ was taken out after the time for completing the contract. That case is consistent with the defendant's position, which is, that an act incapacitating the defendant, in law, from

(a) In the Exchequer Chamber, 6 *Com. B.* 160., reversing the decision of the Common Pleas in *Elderton v. Emmens*, 4 *Com. B.* 479. Judgment of Exch. Ch. affirmed in Dom. Proc.; *Emmens v. Elderton*, 4 *H. L. Ca.*

(b) 17 *Q. B.*

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completing the contract is a breach, because it is implied that the parties to a contract shall keep themselves legally capable of performing it; but that an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal: but till then it may be retracted. Such is the doctrine in *Phillpotts v. Evans* (a) and *Ripley v. M'Clure* (b). [Crompton J. May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?] If he adopts the defendant's notice, which is in legal effect an offer, to rescind, he must adopt it altogether. [Lord Campbell C. J. So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle. Erle J. Do you go one step further? Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on 1st June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?] It would be, in such a case, a question of fact for a jury, whether there had not been an exoneration. In *Phillpotts v. Evans* (a) it was held that the measure of damages was the market price at the time when the contract ought to be completed. If a refusal before that time is a breach, how could these damages be ascertained? [Coleridge J. No doubt it was possible, in this case, that, before the 1st June,

(a) 5 M. & W. 475.

(b) 4 Exch. 345.

the plaintiff might die, in which case the plaintiff would have gained nothing had the contract gone on. Lord Campbell C. J. All contingencies should be taken into account by the jury in assessing the damages. *Crompton* J. That objection would equally apply to the action by a servant for dismissing him before the end of his term, and so disabling him from earning his wages; yet that action may be brought immediately on the dismissal; note (a) to *Cutter v. Powell* (b).] It is quite possible that the plaintiff himself might have intended not to go on; no one can tell what intention is. [Lord Campbell C. J. The intention of the defendant might be proved by shewing that he entered in his diary a memorandum to that effect; and, certainly, no action would lie for entering such a memorandum. But the question is as to the effect of a communication to the other side, made that he might know that intention and act upon it.]

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Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

On this motion in arrest of judgment, the question arises, Whether, if there be an agreement between *A.* and *B.*, whereby *B.* engages to employ *A.* on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, *A.* being to receive a monthly salary during the continuance of such service, *B.* may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle *A.* before the

(a) 2 *Smith's Leading Cases*, 8. 20. See also *Goodman v. Pocock*, 15 Q. B. 576.

(b) 6 T. R. 320.

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day to commence an action against *B.* to recover damages for breach of the agreement; *A.* having been ready and willing to perform it, till it was broken and renounced by *B.* The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement, before that day, to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage; *Short v. Stone (a)*. If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract; *Ford v. Tiley (b)*. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them; *Bowdell v. Parsons (c)*. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a sur-

(a) 8 Q. B. 358.

(b) 6 B. & C. 325.

(c) 10 East, 359

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render of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Elderton v. Emmens* (a), which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defend-

(a) 6 Com B. 160. Affirmed in Dom. Proc.; *Emmens v. Elderton*, 4 H. L. Ca.

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ant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of *Europe*. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st *June*, he is prejudiced by putting faith in the defendant's assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for *Australia*, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of *Europe* in the months of *June*, *July* and *August* 1852: according to decided cases, the action might have been brought before the 1st *June*; but the renunciation may have been founded on other facts, to be given in evi-

dence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of *June* is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of *September*, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. *Leigh v. Patterson* (a) only shews that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to *Bowdell v. Parsons* (b), might have been brought before that time, as soon as the vendor had sold and delivered them to another. *Phillpotts v. Evans* (c) was a similar case:

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(a) 8 *Tunst.* 540.(b) 10 *East*, 359.(c) 5 *M. & W.* 475.

1852. and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat; the Court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered; the Court professing to proceed upon the rule laid down in *Startup v. Cortazzi* (a), where no question arose as to the right to bring an action before the stipulated day of delivery on a renunciation of the contract. *Parke* B., whose dicta are entitled to very great weight, certainly does say in *Phillpotts v. Evans* (b), with reference to the notice by the defendants that they would not accept the corn: "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it." But the learned Judge might suppose that the notice did not amount to a renunciation of the contract; and, if he thought that, after such a renunciation, the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In *Ripley v. McClure* (c) it is said that, under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract: but the Court intimated no opinion upon the question whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has

(a) 2 C. M. & R. 165.

(b) 5 M. & W. 477.

(c) 4 Exch. 345.

a remedy for a breach of the contract. And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done. The only other case cited in the argument which we think it necessary to notice is *Planché v. Colburn* (a), which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise; but, before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed, tendered and delivered the treatise, according to the contract. *Tindal* C. J. said: "The fact was, that the defendants not only suspended, but actually put an end to, '*The Juvenile Library*;' they had broken their contract with the plaintiff." The declaration contained counts for work and labour: but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus shewing that, in the opinion of the Court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. If it should be held that, upon a contract to do an

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act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action: and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.

Saturday,
June 25th.

The QUEEN, on the prosecution of WHITTLE and ROBINSON, *against* The Commissioners of Land Tax for the TOWER Division, MIDDLESEX.

The duty of the Commissioners of land tax, in assessing the contributions by the several parishes within a Division, is regulated, not by stat. 38 G. 3. c. 5. s. 8., but by stat. 38 G. 3.

c. 60. s. 74. (reenacted by stat. 42 G. 3. c. 116. s. 180.), which treats the quota payable by each parish towards making up the amount charged on the Division as permanent at its then proportion to the other parishes of the Division.

And this is not altered by any later enactment.

Where, therefore, such quota had, up to the year 1852, been unchanged for 150 years, it was held that the Commissioners were right in continuing the assessment for that year at such quota, although the result was that an unequal poundage was levied in the several parishes.

MANDAMUS, directed to the Commissioners appointed for putting in execution, within and for the *Tower* Division in *Middlesex*, the Act of Parliament passed &c., and another Act &c. (stat. 38 G. 3. c. 5., "for granting an aid to His Majesty by a land tax, to be raised in *Great Britain*, for the service of the year

1798;" stat. 53 *G. 3. c. 142.*, "to explain and amend several Acts relative to the land tax;" stat. 42 *G. 3. c. 116.*, "for consolidating the provisions of the several Acts passed for the redemption and sale of the land tax, into one Act, and for making further provision for the redemption and sale thereof;" &c.; stat. 6 *G. 4. c. 32.*, "to provide for the application of moneys arising in certain cases of assessments for land tax in *Great Britain*;" stat. 4 & 5 *W. 4. c. 60.*, "to amend the laws relating to the land and assessed taxes, and to consolidate the board of stamps and taxes;" and stat. 6 & 7 *W. 4. c. 97.*, "for continuing and making perpetual the duty on certain offices and pensions."). The writ recited that that part of *Middlesex* which in the first mentioned Act is described as The rest of the county of *Middlesex*, before and at the time of passing that Act was, and from thenceforth continually hitherto hath been, and still is, divided into certain Divisions, respectively chargeable and charged with the several proportions which ought to be charged thereon respectively for and towards the raising and making up of the whole sum, pursuant to the statutes in that case &c., from time to time charged upon that part of *Middlesex*, in respect of the sum by the first mentioned Act charged upon that part of the said county; "of which said Divisions your said *Tower* Division, during all the time aforesaid, hath been and still is one, and during all the time aforesaid hath consisted, and still does consist, of divers parishes and places, which, during all the time aforesaid, respectively, have been and still are separately assessed to the land tax for raising in each such parish and place its proportion or quota of the amount of land tax from time to time charged and chargeable on the whole of the *Tower*

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Division," to wit &c. : the writ then set out the names of the parishes and places, which included *Christ Church* and *Old Artillery Ground*. That the total amount of land tax, which on 25th *March* last past, and from thence until and at the time of the meeting of the Commissioners on 2d *April* last past, hereinafter mentioned, was and still is chargeable and charged upon the said part described as aforesaid as The rest of the county of *Middlesex*, amounts to 107,602*l.* 1*l.* 7*d.*, whereof, during all the time last aforesaid, and at the time of the said meeting on 2d *April* last past, the proportion chargeable and charged on the said division amounted and amounts to 29,964*l.* 15*s.* 0½*d.*, whereof 10,740*l.* 1*s.* 10½*d.*, during all the time last aforesaid, had been and is redeemed. That, before and on the said 25th *March* last past, and from thenceforth continually until and at the time of the said meeting, the total value of all and every manors, &c., and all other yearly profits, and all hereditaments of what nature or kind soever they be, situate, lying and being, happening or arising, within the *Tower Division* upon which the land tax, during all the time last aforesaid, hath been and now is, pursuant to the statutes in such case &c., chargeable, and not redeemed or exonerated during all the time last aforesaid, was and now is 472,427*l.*, by the year, being the aggregate of the annual values of all and every the said manors, &c., and all other yearly profits, and all hereditaments &c., situate &c. within the *Tower Division*, then and now chargeable as aforesaid, and not redeemed, in the said several parishes and places respectively: which said several annual values, in the said parishes and places respectively, during all the time last aforesaid, were and still are as follows, that is to say: the said parish &c. (stating

the respective values). That an equal taxation and assessment of the land tax, during all the time last aforesaid, and now chargeable and charged upon the said Division, and unredeemed, made, pursuant to the statutes &c., within the said Division, and within every parish and place therein liable to be assessed &c., would cause all and every the said manors, &c., and all other yearly profits, and all hereditaments, &c., situate, &c. within the *Tower* Division, respectively chargeable thereto as aforesaid, in the said parishes and places respectively, and whereon the land tax has not been redeemed, to be taxed and assessed in that behalf after a rate not exceeding one shilling in the pound on the annual value thereof respectively, to wit after the rate of ten pence halfpenny in the pound on the annual value thereof respectively. That the defendants "are in possession of certain documents purporting to be assessments of land tax in the said several parishes and places in the said Division, in certain former years, according to certain quotas and proportions; and that the said last mentioned quotas and proportions, when taken in computation to be the quotas and proportions of the assessments of land tax on the said several parishes and places for the year commencing on the 25th day of *March* now last past, cause the land tax chargeable and charged on the said Division as aforesaid to be unequally taxed and assessed, within the said Division and within every parish and place therein liable to be assessed as aforesaid; that is to say" &c., stating the rates in the pound in the several parishes and places, which varied from 6*d.* to 2*s.* 7*d.* in the pound, and amounted to 1*s.* 8*d.* in *Christ Church* and to 2*s.* 2*d.* in *Old Artillery Ground*, "on the several annual values of the respective manors," &c., "and all other yearly" &c., "and all

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other hereditaments," &c., "situate," &c. "within the said *Tower Division*," "and whereon the land tax had not been redeemed." That the Commissioners did, on 2d *April* last past, duly meet for the purpose of doing all such things as should be requisite, pursuant to the statutes, for taxing and assessing the proportions of land tax chargeable on the said Division for the year commencing 25th *March* last past, and well knew the aforesaid amounts, values, calculations and premises, and had notice thereof, and knew the same to be true, and were then and there requested by *Joseph Ledgold Whittle*, on behalf of himself and the other inhabitants of *Christ Church*, chargeable to the land tax within the Division, and by *Thomas Robinson*, on behalf &c. (in respect of *Old Artillery Ground*), "to cause the said proportion of land tax then chargeable and charged on the said Division as aforesaid to be then and there equally taxed and assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid, according to the best of your judgments and discretion, pursuant to the statutes in such case" &c. But that the Commissioners present, disregarding the statutes &c., did not cause &c., "but then and there wholly refused and neglected so to do, or to exercise any judgment or discretion whatsoever for, in or towards the causing the said proportions of land tax to be equally taxed or assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid: but, on the contrary thereof, did then and there, under colour of the said former assessments and quotas, by certain pretended assessments, then and there made contrary to the form of the statutes in such case" &c., "assume to cause the said proportions of land tax, then charged on the said

Division as aforesaid, to be taxed and assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid, according to the quotas and proportions of the said assessments for former years, without any regard to or consideration of the annual or other value for the time then being of the manors," &c., "and all other yearly" &c., "and all other hereditaments" &c., "situate," &c. "within the said *Tower* Division, then respectively chargeable" &c., "and whereon the land tax then had not been redeemed" &c. "in the said several parishes" &c.: the Commissioners well knowing that by the said pretended assessments they caused the proportions to be unequally taxed and assessed. And that the Commissioners hitherto neglected and refused, and still &c., to cause the proportions &c. to be equally taxed and assessed, to the damage of divers inhabitants rateable to the land tax within the Division: "as We have been informed by the complaint" of *J. L. Whittle*, an inhabitant of *Christ Church*, charged in respect of a house there, and of *T. Robinson*, an inhabitant of *Old Artillery Ground*, charged in respect of a house there. The writ then commanded the Commissioners to meet, "and cause the proportion of land tax charged on the said Division to be equally taxed and assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid, according to the best of your judgments and discretion, pursuant to the statutes in such case" &c., "for the year commencing" 25th *March* 1852: and to enter an adjournment if necessary, and do other things requisite, "in order that the said proportions of land tax charged on the said Division may be equally taxed and assessed:" or shew cause &c.

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1853. Return. That certain Commissioners (named) met for putting into execution the Acts of Parliament &c. That the proportion of land tax chargeable on the Division, to be raised for the year commencing 25th March 1852, after allowing for so much as was redeemed, amounted to 19,246*l.* 3*s.* 3½*d.* That a major part of the Commissioners present (named), "after due deliberation and consideration had and held at the said meeting, for the purpose of and with a view to cause the said last mentioned sum to be equally taxed and assessed within the said Division, and upon all the several parishes and places within the said Division, did, according to the best of our judgment and discretion, cause to be charged, taxed and assessed, within the said Division, that sum upon the said several parishes and places within the said Division, as by the statutes" &c., "in the several sums, quotas and proportions following" (stating them). "Which said several sums, quotas and proportions, so charged upon the said several parishes and places within the said Division, respectively, are and constitute an equal taxing and assessment of the said sum of 19,246*l.* 3*s.* 3½*d.*, within the said Division, and in the said several parishes and places within the said Division, respectively, according to the best of the judgment and discretion of us, the said Commissioners, according to the true intent and meaning of the statutes in such case" &c. for the said year commencing &c. And that the Commissioners, "in pursuance of the said assessments, did give the several sums so charged and assessed on the said several parishes in charge to the assessors of the said several parishes, respectively, in manner and form by the said statutes prescribed." And, by reason of the premises, the Commissioners have not met &c.

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Plea. That the Commissioners did not, according to the best of their judgment and discretion, cause to be charged &c. the proportion of land tax stated to amount to 19,246*l.* 3*s.* 3½*d.*, upon &c., in manner and form &c. And that the sums, quotas and proportions, so charged, as in the return alleged, upon the several parishes &c., are not and do not constitute an equal taxing &c. of the 19,246*l.* 3*s.* 3½*d.*, according to the best of the judgment &c.; in manner and form &c. Conclusion to the country. Issue thereon.

On the trial, before Lord Campbell C. J., at the *Middlesex* Sittings after *Michaelmas* Term 1852, a special verdict was found, the material facts of which were as follows.

Immediately after the passing of the Land Tax Act, 4 *W. & M.* c. 1., that part of *Middlesex* described in stat. 38 *G.* 3. c. 5. as The rest of the county of *Middlesex* was, and thence continually has been, and still is, divided into Divisions respectively chargeable and charged with the several proportions which ought to be charged thereon respectively towards making up the whole sum, pursuant to the several Land Tax Acts from time to time, charged upon that part of *Middlesex*, the *Tower* Division being one, and consisting of the parishes and places named in the writ. And the Commissioners, during all the time aforesaid, have caused the amount from time to time assessed on the whole Division to be assessed within the Division by assessing within each parish a separate amount, so that the several sums amounted to the whole sum assessed on the Division, together with authorized incidental expenses. And that, "with occasional fractional variations of no moment, the said several sums, so from time to time assessed as

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1853. aforesaid, within the said several parishes and places respectively, have, in each and every year, for which such assessment as aforesaid was made on the said Division, since the first assessment thereof, under the first of the said Land Tax Acts, borne the same relative proportions each of them to the whole sum at such respective times assessed upon the said Division." That the amount of land tax, which on 25th *March* 1852 was chargeable upon that part of *Middlesex*, was 107,602*l.* 11*s.* 7*d.*; and the proportion chargeable to the *Tower* Division was 29,964*l.* 15*s.* 0½*d.*, and, after allowing for so much as was redeemed, was 19,246*l.* 3*s.* 3½*d.* That the Commissioners, at the time of their meeting, "were and still are in the possession of certain documents, being assessments of land tax in the said several parishes and places in the said *Tower* Division, for each and every year from the year 1693 down to the year 1851: and that such assessments were made according to certain proportions, being the proportions in this behalf before mentioned: and that the said proportions, when taken in computation as and for the proportions of land tax to be assessed on the said several parishes and places for the year commencing the 25th day of *March* A. D. 1852, caused the land tax chargeable and charged on the said Division to be unequally taxed and assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid: that is to say, according to and at the several rates in the said writ of mandamus in that behalf respectively within mentioned and enumerated, and therein complained of." They were then set out. That the proportions mentioned in the writ as causing an unequal assessment "have been uniformly and con-

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tinuously, and without change or alteration, charged, taxed and assessed upon, and levied and paid by, the several parishes and places respectively within the said Division, so liable as aforesaid, as and for the proportions of land tax chargeable upon and payable by such several parishes and places, during each and every one hundred and fifty years next before and ending with the 25th day of *March* A. D. 1852." That the Commissioners met on 2d *April* 1852, for the purpose of doing all things requisite, pursuant to the statutes, for taxing and assessing the proportions for the year commencing 25th *March* 1852, and had, at the time, notice and information of the premises, and were required, by the persons mentioned in the writ, "to cause the said proportion of land tax, chargeable and charged in the said *Tower* Division, to be equally taxed and assessed within the said Division, and within every parish and place therein liable to be assessed as aforesaid, according to the best of their judgments and discretion, pursuant to the statutes in that case made and provided." "That the said Commissioners, so assembled as aforesaid, had, long before and at the time of the said meeting, full and ample materials to enable them, the said Commissioners, at the said meeting, to cause the proportion of land tax charged on the said Division to be equally taxed and assessed within the said Division, and within every parish and place therein respectively. And the said Commissioners did, at the said meeting, take into consideration and deliberate upon the question, Whether, in making their assessments of land tax for the said Division, and the said several parishes and places therein, for that year, they were bound in law to adhere to the proportions

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assessed, within the said Division and within the said several parishes and places, by the said old assessments, or were bound to make the said assessments for that year according to the altered and then existing values of the several lands, tenements and hereditaments, subjects, matters and things, liable to be taxed and assessed in that behalf, in each such parish and place, relatively to each other. And, upon such consideration and deliberation had, the said Commissioners did then and there decide that they were bound in law by the old assessments, and did then and there resolve to abide by and adhere to the said old assessments, without regard to the relative value of the property within the parishes constituting the Division at the time of making their assessment for the year commencing the 25th day of *March* A. D. 1852. And the said Commissioners, in accordance with their said resolution, did cause the said sum of 19,246*l.* 3*s.* 3½*d.*, so chargeable as aforesaid within and upon the said Division, to be taxed, charged and assessed, within the said Division and the several parishes and places in the same, upon the several lands, tenements and hereditaments, subjects, matters and things liable to be so taxed and assessed, in each such parish and place within the said Division, in the several sums and proportions following :” the sums and proportions were then set out. And those sums, quotas and proportions “were and are the correct sums, quotas and proportions, in that behalf to be assessed, if such sums, quotas and proportions ought in law to have been calculated according to the said old assessments; but that the charging and taxing upon the said several parishes and places within the said Division of the said several

sums, quotas and proportions, so charged, taxed and assessed as aforesaid, does not constitute, nor is the same, an equal taxing charging or assessment of the said sum of 19,246*l.* 3*s.* 3½*d.*, nor of the said sum of 29,964*l.* 15*s.* 0½*d.*, within the said Division and within the said several parishes and places, upon the said several lands, tenements and hereditaments, subjects, matters and things therein liable to be charged and assessed to the land tax according to the relative values thereof as between those parishes, respectively, in reference to one another, on the 25th day of *March* A. D. 1852. And that, except as aforesaid, and except in adhering to and abiding by, and so as aforesaid deciding and determining, in the exercise of their judgment and discretion, to adhere to and abide by the said old sums, quotas and proportions, and in taxing and assessing, and deciding and determining to tax and assess, the said several parishes and places within the said Division, according and with reference to the said old sums, quotas and proportions, and to them only, the said Commissioners did not, at their said meeting, use or exercise any judgment or discretion, with reference to the taxing, charging and assessing of the said sum of 19,246*l.* 3*s.* 3½*d.*, or the said sum of 29,964*l.* 15*s.* 0½*d.*, within the *Tower* Division, and the said several parishes and places within the same." "That the said charging, taxing and assessment, so made by the said Commissioners at their said meeting, was so made by them honestly and bonâ fide, and under the supposition that the same was lawfully made according to the true construction of the statutes in such case made and provided. But whether" &c. (leaving the issue to the Court).

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The case was twice argued, namely in *Easter (a)* and *Trinity (b)* Terms 1853, by *Watson* for the Crown, and Sir *F. Thesiger* for the defendants. The points insisted upon will sufficiently appear from the judgment. Reference was made to the case of the *Westminster Land Tax Commissioners (c)*, *Regina v. Commissioners of Land Tax (d)*, *Williams v. Pritchard (e)*, *Perchard v. Heywood (g)*, *Ward v. Const (h)*.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

This mandamus, reciting that the assessments to the land tax on the parishes and places within the *Tower Division* were unequal in proportions varying from *6d.* in the pound to *2s. 7d.* in the pound, commanded the Commissioners for that Division to cause the land tax charged therein to be equally assessed in those parishes and places. The return stated that the proportions complained of were in the judgment of the Commissioners according to law. And the verdict finds that the assessments to the land tax on those parishes and places have been in those proportions from the year 1693 to the present time. And so the question is raised, Whether those proportions are contrary to law.

For the prosecutors, it was argued that the duty of

(a) May 4. Before Lord Campbell C. J., *Wightman*, *Erle* and *Crompton Js.*

(b) June 11. Before the same Judges.

(c) *Parker*, 74.

(d) 16 Q. B. 381.

(e) 4 T. R. 2.

(g) 8 T. R. 468.

(h) 10 R. & C. 635.

the Commissioners is regulated by stat. 38 *G. 3. c. 5. s. 8.*, commanding them to cause the sums fixed for their Divisions to be *equally* assessed within the parishes or places therein, according to the best of their judgment; that they had knowingly caused those sums to be unequally assessed within those parishes and places, contrary to the statute; and that they were not justified in thus violating a clear enactment by the usage stated in the verdict. But we are of opinion that this argument fails, on the ground that the duty of the Commissioners, in causing the districts of their Divisions to be assessed, is not regulated by stat. 38 *G. 3. c. 5. s. 8.*, granting an aid under the name of land tax for the year 1798, but by stat. 38 *G. 3. c. 60.*, making perpetual a part of that land tax so granted for a year, and effecting a change both in the nature of the tax and in the mode of assessing it.

In support of this opinion, we proceed to shew: 1st, the nature of the land tax under stat. 38 *G. 3. c. 5.*, and then the change made by stat. 38 *G. 3. c. 60.* and the other statutes made in furtherance thereof.

By stat. 4 *W. & M. c. 1.* the Parliament granted an aid of 4*s.* in the pound upon all property; which, for our present purpose, we class under the heads of personal property, salaries and land: and provisions were made for the effective assessment of these three kinds of property. Under these provisions the kingdom became parcelled into Divisions for which separate commissioners acted; and these Divisions became parcelled into parochial and other Districts, for which separate assessors acted. And, in this judgment, we have thought it best to use "Division" and "District" to denote these meanings; for we have felt that the want of two such terms in the

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statutes on this subject has made the subject less clear than it might be. Under stat. 4 *W. & M. c. 1.* the assessments for the Districts, shewing the quota to be paid by each, were to be returned by the assessors to the commissioners; and the commissioners were to make duplicate copies of all the assessments in their Division, one for the Receiver General and one to be returned to the Remembrancer in the Exchequer, shewing the quota to be paid by the Division and the quota to be paid by each District of the Division; the aggregate of the quotas for the Divisions giving the total produce of the tax.

In the early part of this reign, grants of aids were repealed, varying slightly in name and form, the inappropriate name of land tax not at first appearing in the title of the Acts, and the form at first being for a pound rate on all the rateable subjects. Ultimately these grants resulted in an annual grant of a fixed sum, called "an aid by a land tax." That sum was charged by the statute in fixed proportions upon the different Divisions; and these proportions appear to have been taken from the duplicates of the assessments returned under stat. 4 *W. & M. c. 1.*

We find no enactment dividing the fixed proportion of the Division in fixed proportions among the Districts thereof, so as to give a statutable sanction to the usage in that respect, which is found by the verdict to have been followed from 1693 to the present time in this Division. On the contrary, the commissioners are directed to cause the fixed proportion for the Division to be levied by causing the personalty and the salaries to be assessed in each District at four shillings in the pound, and the land in each District to be so assessed, by an equal

pound rate, as that the produce of the rate on the land, when added to the produce of the other rate of four shillings in the pound, should make up the fixed proportion for the Division. It is obvious that, if this direction had been followed, the amount to be charged on the land was contingent on the annual produce by the other rate; and that, as the value of personal property and salaries increased, the amount to be raised from the land would be lessened and might entirely cease.

Stat. 38 *G. 3. c. 5.* is in the accustomed form: and the direction to the commissioners for assessing is to the effect contended for by the prosecutors: and that direction does not seem to support the usage which, according to the verdict, has prevailed in this Division from 1693 to the present time. That usage may be accounted for: because, for some years after 1693, an effective valuation in that year would remain substantially correct; and, after those years, the usage may have remained unquestioned, or been preferred to an annual valuation and assessment founded thereon. In our present judgment, it is not necessary to decide on the origin or the legality of this usage: but the law for assessing to the land tax, and the mode of executing that law prevailing in 1798, should be understood for the sake of understanding the change introduced in that year by stat. 38 *G. 3. c. 60.*, to the consideration of which we now proceed.

The object of the Legislature, in passing this statute, was to support the public credit by making a part of the national debt a charge upon the land. The statute passed in *June* 1798, while the assessments under stat. 38 *G. 3. c. 5.* were in the course of being made; for by that statute the process for assessing is to begin after

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the 30th of *April* 1798, and the duplicates of the completed assessments are to be returned by the 8th of *August* 1798: the assessors of the Districts are, by this statute, directed to divide their assessments. Thus, in the course of formation into the three heads of property before mentioned, namely personalty, salaries and lands, so much of the assessment for that year as should charge the land is made a perpetual charge thereon, subject to redemption in the manner and with the limitations explained more particularly after we have considered the effect of this process on the two other heads of property subject to assessment. As the land was before subject to a contingent amount, depending upon the produce from the other sources, and would for the future be charged with a fixed sum, it became necessary to alter the mode of charging those other sources in the future annual grants of a tax on them. And accordingly we find, in stat. 39 *G. 3. c. 3.*, passed in *December* 1798, for granting the tax on those heads for 1799, that the commissioners are no longer directed to apportion the fixed proportion for their Division among the Districts, and to cause the proportion for each District to be levied by a rate of four shillings in the pound on the personalty and salaries, and the residue on the land: but, the assessments of the Districts for 1798, under stat. 38 *G. 3. c. 5.*, being assumed to be divided under the heads of land, personalty and salaries, and the quota in that assessment for each District upon land to be disposed of by stat. 38 *G. 3. c. 60.*, then the quota in the same assessment for each District upon personalty is taken to be a fixed quota for that District under that head, and is to be levied, not by a tax of four shillings in the pound, but by an equal pound rate upon that District, sufficient to raise that fixed quota.

And, with respect to the quota for salaries in the assessment 1798 for each District, the District is discharged therefrom; but the salaries are to be charged where the office is executed, at a rate not less than the rate in the assessment of 1798; and some annuities under this head, payable at the Exchequer, are made liable to four shillings in the pound at the place of payment. This arrangement, fixing a quota for each District in respect of personalty, is enacted by the earlier sections of the statute. And sect. 8 provides for a deficiency in the collection, from inability to pay, or from mistake or otherwise, by giving the commissioners a power to make a reassessment on the place in which the defect occurs as shall seem agreeable to justice: and it is also provided that the assessment is not to exceed four shillings in the pound. It is thus apparent that the Legislature, after stat. 38 *G. 3. c. 60.*, treated the fixed proportion of the Division as apportioned among the Districts thereof in a fixed quota for each District. In respect of personalty, it also treated the quota theretofore assessed on each District in respect of salaries as in one sense fixed; for it transferred that charge from the District to the place of the office, and so exempted the District therefrom. And thus the duty imposed on the commissioners, by stat. 38 *G. 3. c. 5.*, as to causing personalty and salaries to be equally assessed throughout the Districts of their Divisions, was at an end; and the quota for each District as to personalty, under stat. 39 *G. 3. c. 3.*, became fixed by reference to the assessment for 1798, nearly to the same extent as the quota for each Division had become fixed by reference to the assessment under stat. 4 *W. & M. c. 1.*

We are thus brought to the point governing the

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present case: namely, the duty of the commissioners, after stat. 38 *G. 3. c. 60.*, in respect of causing the lands of their Division to be assessed to the land tax on land.

The prosecutors contend that their duty remained as it was enacted by stat. 38 *G. 3. c. 5.*, to cause so much of the fixed proportion for the Division as was charged on land to be assessed equally by rates on all the lands of the several Districts of the Division. But it appears to us that stat. 38 *G. 3. c. 60.* created a fixed quota to be raised from the land of each District, and that the sections we are about to mention produce that effect.

By sect. 1 it was enacted that the several and respective sums charged, by virtue of stat. 38 *G. 3. c. 5.*, on the Divisions of *Great Britain*, in respect of the lands therein, for one year, should continue and be raised yearly for ever, subject to redemption. If the effect of this section had not been altered by those that follow, a quota would have been fixed for each estate which formed the subject of a separate charge in the assessment for 1798. By sect. 2 personalty and officers are exempted from the operation of that Act. By sect. 3 the sums charged or to be charged in the assessments then being made, under stat. 38 *G. 3. c. 5.*, on personalty and offices are to be separated and divided from the remainder of the moneys charged in the assessment for each District, and are to be so returned in the duplicates of such assessments to be transmitted by the commissioners to the Exchequer. By sect. 8 it was made lawful for the commissioners to contract with persons having a preference, as owners or otherwise, in respect of any lands, for the redemption of the land tax charged thereon, according to the assessment made or to be made under stat. 38 *G. 3. c. 5.* This power of redemption applies to the quota charged

upon the particular lands, the subject of the contract. By sect. 68 it was enacted that, after 25th *March* 1799, the commissioners might sell to persons not entitled to any such preference the whole or any part of the land tax remaining unsold. This again applies to the quota for each particular estate in the assessment for 1798. Then, by sect. 74, it is enacted that the whole of the land tax charged on any District shall, notwithstanding the discharge of any part thereof, continue to be inserted in the certificate of assessment to be signed by the commissioners of land tax, so long as any part of the proportion of land tax charged in such District shall remain payable; and that all lands that shall not be exonerated by virtue of this Act from the land tax shall continue subject to a new yearly assessment, by an equal rate, according to the annual value, not exceeding four shillings in the pound; and that such part of the said land tax which shall remain payable as aforesaid in any District shall be levied in the same manner as if the lands charged with the land tax so remaining payable as aforesaid formed an entire District, and according to such methods as are prescribed by the Act of the present sessions with respect to the quota of each District. It is under this section, which is reenacted by stat. 42 *G. 3. c. 116. s. 180.*, that the commissioners act in causing the yearly assessment to the land tax on land to be made; and their duty is created and regulated thereby: and the section, in our understanding of it, directs that the quota for the land of the District on the assessment of 1798 made for that year under stat. 38 *G. 3. c. 5.* should be assumed as a fixed quota for the District, subject to small variations mentioned below, and subject to redemption: and it further directs an annual assessment

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to raise the unredeemed part of that quota from the unredeemed part of the land of the District. It seems to us that the quota, here taken to be fixed for the land of the District as the quota for personalty, was in express terms enacted to be fixed by stat. 39 *G. 3. c. 3.*; and the same express enactment was not used in the case of land, because the enactment was to be adapted in that case to the process of redemption, which did not apply to personalty. It further seems to us that the reference to the quota for the District fixed "by the Act of the present Session of Parliament" referred to stat. 39 *G. 3. c. 3.*, and not to stat. 38 *G. 3. c. 5.*, as is expressed in stat. 42 *G. 3. c. 116. s. 180.*; because there is no fixed quota for the District in stat. 38 *G. 3. c. 5.*; and, although the Act is referred to as "of the present session," and did not pass till the next session, yet, as stat. 38 *G. 3. c. 60.* passed at the close of that session and stat. 39 *G. 3. c. 3.* passed at the beginning of the following session, the first being in *June* 1798 and the second in *December* 1798, and as the two Acts are one arrangement for future land tax rendered necessary by the redemption of the land tax on land, we think it probable that stat. 39 *G. 3. c. 3.* was proposed at the same time as stat. 38 *G. 3. c. 60.*, and expected to pass with it, and so was referred to by the above description, which became inapplicable, as it was postponed till after the recess of 1798. But, whether we are right in this supposition or not, we think that the true construction of the section now in question is as above explained.

The subsequent enactments, providing both for variations rendered necessary either by change of value or on account of mistakes, and for other purposes, confirm this view.

Thus, by stat. 38 *G. 3. c. 60. s. 103.*, if any assessment which shall continue to be charged in pursuance of this Act shall be found to exceed four shillings in the pound, there may be abatement in the manner in such case directed in the said Act of the present session, by which we understand stat. 39 *G. 3. c. 3.* for the reasons before given. And, by stat. 38 *G. 3. c. 60. s. 105.*, when in any parish or place separately assessed to the land tax (that is District) the whole of the land tax charged thereon is redeemed, all assessment in that District shall cease.

Stat. 39 *G. 3. c. 6. s. 15.* gives some recognition to past usage, as guiding in the assessment of Districts in 1798; for it enacts that, where the sums assessed in that year under stat. 38 *G. 3. c. 5.* are greater or less than the sum *which has been imposed on such parish or place* in respect of such lands, on complaint the Commissioners may ascertain the *sum which has been set on such District*; and, in case of doubt, the certificate of the Remembrancer of the Exchequer, or of the Barons in *Scotland*, after inspecting duplicates returned for twenty years, is to be decisive. Sects. 16, 17 provide for lands omitted: they may be assessed, and a proportion deducted from the assessment on the other lands of the District.

Stat. 42 *G. 3. c. 116.* repeals part of stat. 38 *G. 3. c. 60.*, but not the part continuing for ever the several and respective sums charged in the assessment for 1798, and the powers in that Act contained for putting the same in execution. Sect. 180 provides for a continued assessment of the District, as long as any part of the land tax charged thereon remains unredeemed, in the same terms as sect. 74 of stat. 38 *G. 3. c. 60.*, except that the reference therein to the quota for each District

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under the Act of the then session of Parliament, which we have applied to stat. 39 *G.* 3. c. 3., is applied to stat. 38 *G.* 3. c. 5. But of this we have spoken before.

Stat. 6 *G.* 4. c. 32. s. 1., making provision for the assessment exceeding the fixed quota for each District, and stat. 2 *W.* 4. c. 127., making provision for the transfer of Districts from one Division to another, with their fixed quota, and stat. 4 & 5 *W.* 4. c. 60. s. 1., for transferring districts with assessments from one Division to another, and stat. 5 & 6 *Vict.* c. 37., also for transferring Districts or portions of Districts from one Division to another, with the amount charged thereon, are consistent with our present judgment, and support it, and cannot easily be reconciled with the prosecutor's case.

To this review of the statutes is to be added the long usage found by the verdict, and the important interests dependent thereon. If the words of the statute are clear, considerations from this source cannot alter their effect: but, if the words are capable of two constructions, public convenience ought to be regarded in considering the probable intention of the Legislature.

Judgment for the defendants.

MEMORANDUM.

In this vacation, *Stephen Temple*, of the *Inner Temple*, *Edward James*, of *Lincoln's Inn*, *Montague Smith*, of the *Middle Temple*, and *William Robert Grove*, of *Lincoln's Inn*, Esquires, were appointed Her Majesty's Counsel.

END OF TRINITY VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XVII. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

LORD CAMPBELL C. J.
COLERIDGE J.

WIGHTMAN J.
ERLE J.

In the matter of ALFRED EGGINGTON.

*Wednesday,
November 2d.*

IN the last Vacation, a writ of habeas corpus ad subjiciendum issued, directed to the keeper of the common

E., having
been dismissed
from the office
of town clerk
of the borough

of *L.*, was, at the instance of the town council, convicted before two justices, under stat. 5 & 6 W. 4. c. 76. s. 60., of wilfully refusing to deliver accounts, books, &c., after notice: and thereupon the justices issued their warrant for the imprisonment of *E.* in the common gaol of the county of *S.* (within which *L.* was situate); which was delivered to *P.*, who arrested *E.* on a Sunday, and on the next day delivered him to the keeper of the gaol at *S.* Held: that this was substantially a civil proceeding, and the arrest therefore illegal under stat. 29 C. 2. c. 7. s. 6.

And that the detention was not made legal by the delivery to the keeper, after the arrest, of another warrant upon the same conviction.

These two warrants having been returned to a habeas corpus ad subjiciendum, the Court

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received an affidavit that the arrest took place on a Sunday, and ordered the prisoner to be discharged from custody under the two warrants.

Before the keeper received the order, another warrant was delivered to him for the imprisonment of *E.* upon his conviction by two justices for not delivering to the council, acting as paving commissioners under a local act, accounts, books, &c. Held: that this, being substantially a proceeding by the same parties, did not warrant the detention.

After the keeper received the order, but *E.* not having been discharged, the sheriff of *S.* lodged with the keeper his warrant, under a ca. sa. at the suit of *H.* against *E.*

Held: that *E.* might be lawfully detained under the ca. sa., no collusion appearing between the sheriff or *H.* and the town council.

gaol at *Stafford*, commanding him to have in this Court the body of *Alfred Eggington*, together with the day and cause &c., to undergo &c.

The writ was obtained on the affidavit of *Eggington*. He deposed that, on Sunday, 16th October last, he was, shortly after his attending Divine service, taken into custody, by one *Joseph Page*, at the borough of *Birmingham*, upon a warrant, a copy of which was made an exhibit. The warrant, so far as it is material to the present case, was as follows.

"City and county of *Lichfield*. To the constables and dozers of the city and county of *Lichfield*, and to the keeper of the common gaol at *Stafford* in the county of *Stafford*, and to every of them.

"Whereas complaint was made, on the 3d day of October instant, before the undersigned the Rev. *Trevor Owen Burnes Floyer*, clerk, one of Her Majesty's justices of the peace in and for the said city and county of *Lichfield*, by *James Burton*, the younger, of" &c., "on behalf of the council of the same city: For that, on the 12th day of September last, at the parish of *St. Mary* in the said city and county of *Lichfield*, *Alfred Eggington*, of" &c., "late town clerk of the said city, was duly required, by notice in writing under the hands of three members of the council of the said city, in pursuance of the order and direction of the said council, to deliver at the *Guildhall* of the said city to the said *James Burton*, who was by the said council authorized to receive the same, a true account in writing of all matters committed to his, the said *A. Eggington's*, charge, by virtue of an Act" &c. (stat. 5 & 6 W. 4. c. 76.), "and also of all moneys by

him received by virtue or for the purposes of the said Act, and also of the amount expended and disbursed by him, and for what purposes, together with proper vouchers for such payments, and also a list of the names of all such persons as had not paid the moneys due from them for the purposes of the said Act, and of the amount due from each of them, and also to deliver to the said *J. Burton*, so authorized as aforesaid to receive the same, all books, papers and writings in his custody or power, relating to the execution of the said Act, and to give satisfaction to the said *J. Burton* respecting the same, and that, ever since such order, direction and notice, the said *A. Eggington* had wilfully neglected, and still did wilfully neglect, to deliver such account, and the vouchers relating to the same, and such list, and also all books, papers and writings in his custody or power, relating" &c., "to the said *J. Burton*, and also to give satisfaction" &c.: "And whereas the said justice issued a warrant, under his hand and seal, for bringing the said *A. Eggington* before any two of Her Majesty's justices of the peace for the said city and county of *Lichfield*: And whereas the said justice also issued his summons to the said *A. Eggington*, requiring him to appear on *Friday* the 7th day of *October* instant, at 11 o'clock in the forenoon, at the *Guildhall* in the said city and county of *Lichfield*, before such justices of the peace for the said city and county as might then be there, to answer to the said complaint, and to be further dealt with according to law: And whereas the said *A. Eggington* was served with the said summons, as is now proved on oath before us; but he did not appear in obedience thereto on the said 7th day of *October*, from which day the hearing of the said complaint has been adjourned,

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nor does he now appear before us; neither has he been found by *Joseph Page*, the constable having the execution of the said warrant, as is also now proved upon oath before us: And whereas, on this 8th day of *October* A.D. 1853, We, the said *T. O. B. Floyer* and *Richard Croft Chawner*, Esq., one other of Her Majesty's justices of the peace in and for the said city and county of *Lichfield*, did proceed to hear and determine the matter of the said complaint: and, upon such hearing, it now duly appears to us that the said *A. Eggington* was removed from the said office of town clerk on the 12th day of *September* last, and that he has wilfully neglected to deliver such account, and the vouchers relating thereto, and such list as aforesaid; and that certain books, papers and writings, relating to the execution of the said Act, and particularly that the corporation minute book and cheque book, remain in the hands or in the custody or power of the said *A. Eggington*; and that he has wilfully neglected to deliver the same or to give satisfaction respecting the same: And we, the said justices, do adjudge that the said *A. Eggington* shall be committed to the common gaol at *Stafford*, for the said county of *Stafford*, being the common gaol for the said city and county of *Lichfield*, there to remain without bail until he shall have delivered a true account as aforesaid, together with such vouchers and list as aforesaid, and until he shall have delivered up such books, papers and writings, or have given satisfaction in respect thereof, to the said *J. Burton*, as aforesaid: These are therefore, in Her Majesty's name, to command you the said constables and dozers, or some or one of you, to take the said *A. Eggington*, and him safely to convey to the said gaol at *Stafford* aforesaid, and there to deliver

him to the keeper thereof, together with this precept. And we do hereby command you, the said keeper of the said gaol, to receive the said *A. Eggington* into your custody in the said gaol, there to imprison him until he shall have delivered a true account as aforesaid, together with such vouchers and list as aforesaid, and until he shall have delivered up such books, papers and writings, or have given satisfaction in respect thereof, to the said *J. Burton*.

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"Given under our hands and seals, at the *Guildhall* of the said city and county of *Lichfield*, this 8th day of *October* 1853. *T. O. Burnes Floyer* (L. s.). *R. C. Chawner* (L. s.)."

The warrant was backed for execution in *Staffordshire* by the same justices, being also justices of *Staffordshire*, and for execution in *Birmingham* by a justice of *Birmingham*.

Eggington further deposed that he was, on the arrest, taken to a lock-up in *Birmingham* by *Joseph Page*, and conveyed by a midnight train, the same night, from *Birmingham*, and delivered over to the keeper of the *Stafford* gaol.

W. Fulford, keeper of the gaol at *Stafford*, returned as follows. "I hereby certify that the within named *Alfred Eggington* was lodged in my custody on the 17th day of *October* 1853. The residue of the execution of this writ appears in certain schedules hereto annexed."

The schedules consisted simply of copies of two warrants. The first was the warrant before mentioned. The second was as follows.

"City and County of *Lichfield*. To the constables and doznerns of the city and county of *Lichfield*, and to the keeper of the common gaol at *Stafford*, in the county of *Stafford*, and to every of them.

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"Whereas *Alfred Eggington*, of" &c., "was this day duly convicted, on the complaint in writing bearing date the 3d day of *October* instant, on the oath of *James Burton* the younger, attorney's clerk, the person authorized by the council of the said city for that purpose, and on the evidence on oath of the said *J. Burton* and others, before us, The Reverend *Trevor Owen Burnes Floyer*, Clerk, and *Richard Croft Chawner*, Esquire, two of Her Majesty's justices of the peace for the said city and county: For that he, the said *A. Eggington*, was lately town clerk of the said city, and was appointed to that office under the provisions of the Act" &c. (5 & 6 W. 4. c. 76.), "and was dismissed from that office on the 12th day of *September* last: and that, on the same day, by the order and direction of the said council, a notice in writing to the said *A. Eggington*, under the hands of *George Birch*, Esq., mayor of the said city, and *Stephen Brassington* and *Frederick Bond*, three of the said council, was delivered to, and left with, one *Nicholas Wildey*, the clerk of the said *A. Eggington*, at the last place of abode of the said *A. Eggington*, in" &c., "by which said notice the said *A. Eggington* was directed to deliver to the said *J. Burton*, who was by the said council authorized to receive the same, at the *Guildhall* of the said city, a true account in writing of all matters committed to his charge by virtue of the said Act of Parliament, and also of all moneys by him received" &c. (as in the first warrant). "And that, ever since the delivery of the said notice as aforesaid, he, the said *A. Eggington*, has wilfully neglected to deliver such account, and the vouchers relating thereto, and such list as aforesaid; and that certain books, papers and writings, relating to the execution of the said Act, and particularly the Corporation minutes and cheque books,

the property of the Mayor, aldermen and citizens of the said city, remain in the hands or in the custody or power of the said *A. Eggington*; and that he has wilfully neglected to deliver the same, and to give satisfaction to the said *J. Burton* respecting the same, as required by the said notice: And it was thereby adjudged that the said *A. Eggington*, for his said offence, should be committed to the common gaol at *Stafford*, in the county of *Stafford*, being the common gaol for the said city and county of *Lichfield*, there to remain without bail, until he shall have delivered a true account as aforesaid, together with such vouchers and list as aforesaid, and until he shall have delivered up such books, papers and writings, and have given satisfaction in respect thereof to the said *J. Burton* as aforesaid: These are therefore to command" &c. (as in the first warrant). "Given under our hands and seals at the *Guildhall* in the said city and county, this 8th day of *October* 1853. *T. O. B. Floyer* (L. s.). *R. C. Chawner* (L. s.)."

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J. Gray now moved that the prisoner might be discharged. There are objections apparent on the face of both the warrants. But, as to the first warrant, the arrest under it took place on a *Sunday*. This does not, indeed, appear by the warrant or return: but the objection may be taken by affidavit, inasmuch as the fact is not inconsistent with the return. [*Lord Campbell C. J.* Just as a question of privilege could be raised by affidavit only.] The affidavit shews that the arrest took place under the warrant therein mentioned, though another warrant has also been returned. First: as to the arrest on the *Sunday*. Stat. 29 C. 2. c. 7. s. 6. provides: "That no

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EGGINGTON'S execute, or cause to be served or executed, any writ,
Case. process, warrant, order, judgment or decree (except in
cases of treason, felony or breach of the peace) but that
the service of every such writ, process, warrant, order,
judgment or decree, shall be void to all intents and
purposes whatsoever; and the person or persons so
serving or executing the same, shall be as liable to the
suit of the party grieved, and to answer damages to him
for doing thereof, as if he or they had done the same
without any writ, process, warrant, order, judgment or
decree at all." Now the party was committed under
stat. 5 & 6 W. 4. c. 76. s. 60., which, with respect to
matters connected with the execution of that Act, directs
that every town clerk, &c., within three months after
the expiration of his office, shall, in the manner directed
by the council, deliver to them, or any person authorized
by them, accounts, vouchers, and lists of persons in
arrear, and shall pay over moneys due from himself:
and, if he neglect to do so, or to deliver, three days
after notice, all books, papers and writings in his custody,
or give satisfaction respecting the same, he may, on
complaint by the council or any person authorized by
them, be brought, by warrant of a justice, before two
justices, who may determine the matter in a summary
way; and, if it appear that the neglect is wilful, the
justices are required "to commit such offender to the
common gaol or house of correction for the county or
jurisdiction where such offender shall be or reside,
there to remain without bail, until" he shall have paid
the moneys, or compounded with the council and
paid the composition, or delivered the account with
the vouchers and lists, or delivered up the books, &c.,

or have given satisfaction. And there is a proviso that the Act shall not abridge "any remedy by action against any such officer so offending as aforesaid," "but such officer shall not be sued by action and also proceeded against in a summary manner by virtue of this Act for the same cause." This is not within the meaning of the exception in stat. 29 C. 2. c. 7. s. 6., a "treason, felony or breach of the peace:" it is rather in the nature of a ca. sa.; but the remedy is more summary than that by civil action. It is substituted for a civil action; the two may not both be put in force: and the detainment is only till the act required is done: it is not a penal commitment. The warrant may be compared to a judgment in detinue. It is not that which "sounds in crime, and leads to punishment," as expressed by Lord Denman; *In the matter of Douglas* (a). So a conviction in a penalty under the Lottery Act, 22 G. 3. c. 47., does not support an apprehension on a Sunday, there not being a constructive breach of the peace; *Rex v. Myers* (b). This is at the utmost, no more than a contempt. [Lord Campbell C. J. Whether a commitment for contempt be in the nature of a criminal proceeding, depends upon the subject matter of the contempt.] To bring the case within the exception in stat. 29 C. 2. c. 7. s. 6. there should be an indictable offence; *Rawlins v. Ellis* (c). Next, if the original arrest was illegal, the second warrant does not authorize the detention. It may be taken that, as the arrest took place on the first warrant, the second has issued since. This cannot, however, get rid of the illegality of the original arrest. That would be a mere evasion of the statute. It is a

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(a) 3 Q. B. 825. 838.

(b) 1 T. R. 265.

(c) 16 M. & W. 172.

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matter of public policy that the proceedings should not be had on a Sunday; *Taylor v. Phillips* (a). [Lord Campbell C. J. Suppose a judge had ordered the party to be discharged: might he not have been taken under the second warrant, the same day?] That might subject the party taking to a penalty of 500*l.*, under stat. 31 C. 2. c. 2. s. 6. It must be contended, on the other side, that, though the original custody was illegal, it became legal as soon as the second warrant was delivered to the gaoler. But it might as well be said that the custody became legal after twelve o'clock on the Sunday night. It is true that a third party, not in collusion with the party making the illegal arrest, may by lawful process detain a party who is under an illegal arrest. But here the parties are the same. [Coleridge J. You are now alluding to civil cases.] On the argument already urged, this proceeding appears to be in its nature civil. [Lord Campbell C. J. Whom do you call the parties here?] The council of *Lichfield*: they are not the less so because the tribunal is that of justices of the peace. The proceeding is at the instance of a subject. In *Barratt v. Price* (b) a sheriff illegally arrested a defendant in one action: and it was held that he could not detain the defendant upon a legal writ which he had in his hands at the time of the illegal arrest. Had there been a legal warrant for another cause of action, at the suit of another party, placed in the sheriff's hands after the arrest, the defendant might possibly have been detained on that. But the parties and the causes are here identical: on comparing the two warrants, it will appear that, though several verbal variations

(a) 3 *East*, 155.

(b) 9 *Bing.* 566.

have been introduced into the second, the two are substantially for the same cause, and on the same conviction.

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Pashley, for the magistrates, and *W. R. Cole*, for the council, *contra*. First. The proceeding was a criminal proceeding. [Lord *Campbell* C. J. The two questions come nearly to one: if the arrest on the *Sunday* was illegal, it was so because the proceeding was not criminal: and, in that case, the authorities as to arrests in civil matters apply.] The test suggested, of the offence being indictable, is not sound. The reason that no indictment lies here is that the enactment which creates the offence imposes the specific punishment. Nor has this any resemblance to commitments for contempt in not paying money; such contempts are, no doubt, generally in the nature of debts, and are so treated, as, for instance, under the Insolvent Debtors' Act, 1 & 2 *Vict.* c. 110. s. 35., &c. Stat. 5 & 6 *W.* 4. c. 76. s. 60. treats the case of money due from the officer differently from that of documents withholden: in the former case there is to be a distress, and a commitment in the case only of there being no goods found; in the latter, if the refusal to deliver be wilful, the commitment must take place in the first instance; and the party is called the "offender" throughout this part of the section. [Lord *Campbell* C. J. Why may not the refusal to pay the money be as well called an offence?] It is so treated sometimes; as, for instance, in the case of non-payment of poor rate, under sect. 4 of stat. 43 *Eliz.* c. 2. [Coleridge J. Is it sufficient for your argument that the party is treated as a criminal? The exceptions are treason, felony and breach of the peace?] Breach of the peace is a wide expression: Lord *Hale*, writing about the time of the

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passing of stat. 29 C. 2. c. 7., says that breach of the peace should be charged in every indictment (a). A warrant to take a man and make him find sureties for good behaviour is within the exception; *Johnson v. Coltson* (b). [Lord Campbell C. J. The charge there is of a breach of the peace.] Only that a breach is to be apprehended. In *Mayor of Lichfield v. Simpson* (c) it was even questioned whether the matter was not exclusively criminal. Sect. 130 gives the form of proceeding, which is there called "the conviction;" and the party is said to be "summarily convicted of any offence against this Act." The great majority of breaches of the peace are punished by summary convictions, not by indictments. For many offences, a party is imprisoned till he pay a fine: but the proceeding is not the less criminal. But, next, at any rate the prisoner is lawfully in custody under the second warrant. A good warrant is an answer to an application for a discharge under a habeas corpus, where the party has been arrested under a warrant reciting a bad conviction; and this may be returned; *Regina v. Richards* (d). Whether an action might lie for the intermediate imprisonment is not now the question. [Wightman J. It is not said here that the first warrant is bad in itself, but only the arrest: I do not see why, if the prisoner is discharged, he may not afterwards be taken under the same warrant.] It should seem that he could not; *In re Williams* (e). [Coleridge J. Sect. 6 of stat. 31 C. 2. c. 2. only forbids a second imprisonment, "other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause."

(a) 2 Hal. Pl. Cr. 188.

(b) T. Raym. 250.

(c) 8 Q. B. 65.

(d) 5 Q. B. 926.

(e) 9 Q. B. 976.

Lord *Campbell* C. J. If a witness is arrested while attending on subpoena, and discharged by a judge, is every subsequent arrest of him on the same process illegal?]

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Gray, in reply, was stopped by the Court.

Lord CAMPBELL C. J. I am of opinion that the prisoner should be discharged. The return is good on its face: but he has a full right to bring before us by affidavit the fact that he was arrested on a *Sunday*. If that were not so, all privilege would be totally unavailing; and a party arrested upon a good warrant under circumstances which made the arrest illegal would have no means of obtaining his liberty. Then the affidavit raises the question, whether this warrant could be executed on a *Sunday*. I think it could not, and that the case does not fall within the exception in stat. 29 C. 2. c. 7. s. 6., either taking the words literally or with any extension which can be given to them by fair construction. The party is not taken for any indictable offence, but merely for not performing his duty. It is the duty of the town clerk, three months after quitting office, to pay over the balance in his hands and to deliver up the documents; and he is made liable to a summary proceeding if he does not do so. When he does not, he certainly is called an "offender" in sect. 60 of stat. 5 & 6 W. 4. c. 76. But he has committed no offence which either actually or constructively is a breach of the peace. The warrant is like a judgment in detinue, which clearly could not be executed on a *Sunday*. That being so, the arrest made on 16th *October* was illegal. Then arises the second question, which is answered by the answer to the first

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question. For we have arrived at the conclusion that the process was in the nature of civil process by the town council of *Lichfield*: and from this it follows that the detention under the second warrant was unlawful. The prisoner could not be detained under it, being in custody by means of the first arrest. It seems to be allowed that, in the case of a civil process properly so called, the party instituting the proceeding under which there has been an illegal arrest cannot take advantage of such arrest by a new detainer; but such new process will be treated as if executed by the unlawful arrest. Here, the council get a second warrant by which they attempt to detain the prisoner who has been illegally arrested under the first. That cannot be done in the case of civil process: the council would be taking advantage of their own wrong.

COLERIDGE J. I am of the same opinion. One word as to the nature of the proceeding. Sect. 60 of stat. 5 & 6 W. 4. c. 76. saves the remedy by action. Therefore it is assumed that a civil action might be maintained, for which this proceeding may be substituted. The proceeding therefore is in substance civil. That being so, the party instituting it cannot avail himself of his own illegal act.

WIGHTMAN J. I concur, and have nothing to add to the reasons which have been given.

ERLE J. This is virtually a civil action. Now, in a civil proceeding, where there has been an illegal arrest, the parties to that proceeding may not, for substantially the same cause, detain the person who is in custody

under the illegal arrest. When he has once been set at liberty, there is no reason why they should not take him.

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The following order was made. "*England*. Upon reading the return to the writ of habeas corpus directed" &c., "and upon reading the affidavit of the said *Alfred Eggington*, and upon hearing" &c., (counsel): "It is ordered that the said *Alfred Eggington* be discharged out of the custody of the said keeper as to his commitments in the said return mentioned" (a).

Afterwards, in this term (*November 12th*), *J. Gray* obtained a rule, calling on the council of the city of *Lichfield*, and *William Hudson*, *John Hudson* and *Thomas Hudson*, to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the gaol at *Stafford*, in and for the county of *Stafford*, commanding him to have the body of the said *Alfred Eggington* before this Court immediately, to undergo and receive" &c.; and why, in the event of this rule being made absolute, the said *Alfred Eggington* should not be discharged out of the custody of the said keeper without the said writ actually issuing, or the said *Alfred Eggington* being personally brought before this Court. Upon notice to the council, or some of them, or their town clerk of the city, and to *W. Hudson*, *J. Hudson* and *T. Hudson*, or their attorney.

The rule was obtained on the affidavit of *Eggington*, dated 10th *November*. He deposed that he was arrested

(a) The prisoner was not brought into Court, upon the return, but remained in gaol, probably by consent. This circumstance was not noticed in Court. The gaoler had not, in fact, been required to bring up the body according to the exigency of the writ.

1853. by *Joseph Page* on *Sunday 16th October*, on the warrant first mentioned, and by virtue thereof committed on 17th *October* to the custody of the keeper of the gaol at *Stafford*. That, on 24th *October*, another warrant was lodged by *Joseph Page* with the keeper of the gaol; which was set out (the warrant secondly above mentioned). That, on 25th *October*, deponent caused a writ of habeas corpus ad subjiciendum to be issued to the keeper of the gaol. The affidavit then stated the return, and the order of this Court. That the order was received by the keeper at 9 A.M. on 3d *November*; but deponent was not, nor had been, discharged. That, at the time the keeper received the order, the only other detainer against deponent was a warrant of commitment lodged by *Joseph Page* with the keeper on 1st *November*, after the keeper had sent off his return, and before it was read to this Court.

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The affidavit then set out the last mentioned warrant: which was dated 31st *October* 1853, and was under the hands and seals of the same magistrates. It recited a conviction of *Eggington*, on the complaint and evidence of *James Burton* the younger, authorized by the council &c. For that *Eggington*, on 13th *May* 1844, was appointed clerk to the council of the said city acting as commissioners (a) in the execution of an Act of Parliament" &c. (46 G. 4. c. xlii., local and personal, public, "for paving, cleansing, lighting, watching, and regulating the streets, lanes, and other public passages and places within the city of *Lichfield*, and the suburbs thereof"), "and continued in the said office of clerk until the 5th day of *September* last, on which day he was removed

(a) See stat. 5 & 6 W. 4. c. 76. s. 75.

therefrom by the said council." That, on 4th *October*, by order of the council, a notice and demand in writing, under the hands of the mayor, seven others of the council, and *Charles Simpson*, clerk to the council under the Act, was delivered at the dwelling house and office of *Eggington*, requiring him within eight days to deliver to *Burton* a true and perfect account of all matters committed to his charge by the said Act, and of all moneys received &c., and how much thereof &c. (as in the notice before mentioned relating to stat. 5 & 6 *W. 4. c. 76. s. 60.*); and that *Eggington* had neglected to make and render such account &c.; and it was adjudged that he should, for his said offence, be committed to the common gaol at *Stafford*, there to remain &c. until he should give and make a perfect account &c., and deliver up &c., or give satisfaction &c.: and the constables and dozers were commanded to take him, and convey him to the gaol at *Stafford*, and deliver him to the keeper, and the keeper was commanded to receive him into "custody in the said gaol, there to imprison him until he shall give and make a true and perfect account as aforesaid, and until he shall deliver up such vouchers, books, papers and writings as aforesaid, or give satisfaction in respect thereof to the said council."

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The affidavit then stated that the three warrants before mentioned were issued, obtained and lodged by or on behalf, and at the instance and request, of the council. That on 4th *November* a warrant under the seal of the sheriff of *Staffordshire*, upon a *ca. sa.* issued on the previous day out of this Court at the suit of *W. Hudson, J. Hudson* and *T. Hudson* against *Eggington*, for debt, was lodged with the same keeper.

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The affidavit then set out this warrant; which was dated 3d *November*, and was to satisfy 24*l.* 9*s.* 10*d.*, and 1*l.* 1*s.* 4*d.* for costs &c., interest on the 24*l.* 9*s.* 10*d.*, besides officers' fees &c.

The affidavit stated that deponent was now detained in the custody of the said keeper under and by virtue of the two last mentioned warrants, and for no other cause whatever; and that he had not been out of the custody of the keeper since he was committed thereto on 17th *October*.

On a later day in this term (*November* 26th),

Pashley, for the town council, and *Griffits*, for the execution creditors, shewed cause. It may be questioned whether the rule, in this form, can be made in invitoe: there has been no consent. [Lord Campbell C. J. I have repeatedly granted it, in vacation, in this form, without consent, in order to avoid the necessity of bringing up the party.] The warrant of 31st *October* is for a cause distinct from that upon which the first two warrants issued. [Lord Campbell C. J. We must adhere to our former decision, of the propriety of which I feel no doubt. I do not see how the council, having the party in custody under an illegal arrest, mend the matter by detaining him for a new cause.] The new cause will not, upon the view before taken by this Court, cure the fault if the party detaining be considered to be identical with the party arresting. But the council now detain in a new character, that of Commissioners for paving &c.: and the question is whether the diversity of character does not destroy the identity of the party. [Lord Campbell C. J. Surely it

is substantially the same party.] The detention then must be supported, if at all, on the ca. sa., issued by different parties. No collusion appears between the council and the execution creditor (*a*). [*J. Gray*, in answer to a question from *The Court*, mentioned *Barratt v. Price* (*b*).] The general rule is that a person illegally in custody at the suit of one party is not privileged from arrest at the suit of another person, unless there be collusion; *Howson v. Walker* (*c*), *Davies v. Chippendale* (*d*), *Collins v. Yewens* (*e*), *Ex parte Cogg* (*g*), *Barclay v. Faber* (*h*), *In re Ramsden* (*i*). *Barratt v. Price* (*b*) is explained in *Robinson v. Yewens* (*k*). It was a case where there had been, not a new detention under the ca. sa. insisted upon, but an illegal arrest upon mesne process, the ca. sa. having been in the sheriff's hands at the time of the illegal arrest, and the arrest therefore enuring to the ca. sa.: so that, in legal effect, the party was arrested illegally under the ca. sa., as well as upon the mesne process. But here the illegal arrest was not, actually or virtually, under the warrant upon the ca. sa.; for, at the time of the arrest, that warrant did not exist. The execution creditors had therefore no mode of charging *Eggington* except by detaining him in the gaoler's custody; *Hutchins v. Kenrick* (*l*) shews the practice in this respect.

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(*a*) Some circumstances were suggested in the affidavit, as shewing collusion: but the counsel supporting the rule disclaimed insisting upon them.

(*b*) 9 *Bing.* 566.

(*c*) 2 *W. Bl.* 823.

(*d*) 2 *B. & P.* 282.

(*e*) 10 *A. & E.* 570.

(*g*) 6 *Dowl. P. C.* 461.

(*h*) 2 *B. & Ald.* 743.

(*i*) 3 *D. & L.* 748. 754. note (*a*).

(*k*) 5 *M. & W.* 149.

(*l*) 2 *Burr.* 1048.

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J. Gray, contra. The gaoler here had *Eggington* in custody illegally from the first: he could not keep him upon a new charge. [*Coleridge J.* But the sheriff, who acted upon the ca. sa., never arrested illegally: his act is more like an arrest than a detainer.] The gaoler is his officer: and, at any rate, from the time of his receipt of the order of this Court was acting illegally in detaining. The case is thus within the authority of *Barratt v. Price (a)*. [*Coleridge J.* The principle of that decision is that an arrest is an arrest under all the warrants that the sheriff has in his hands at the time. Therefore, if the arrest be illegal, the party is arrested illegally on all those writs: that is, he was not legally arrested on any. But that is inapplicable here: *Eggington* was not, upon the illegal arrest, in custody under the ca. sa. *Wightman J.* Suppose, instead of pursuing the form of a detainer, the sheriff had made out his warrant to another officer who had gone into the gaol and formally arrested the prisoner. *Coleridge J.* And, if the prisoner had then been on the criminal side, under the illegal arrest, could not the officer have carried him over to the civil side under the ca. sa. ?] For that the leave of the Court would have been necessary. And, further, the language of stat. 29 C. 2. c. 7. s. 6. is, that the service of the process on *Sunday* "shall be void to all intents and purposes whatsoever." The intention was that nothing should be effected by process so served. [*Lord Campbell C. J.* Nothing by the person causing it to be so served. *Wightman J.* In *Robinson v. Yewens (b)* *Parke B.* said: "The defendant was not first wrongfully

(a) 9 Bing. 566.

(b) 5 M. & W. 149.

arrested by the sheriff, unless he did some subsequent act to adopt the original illegal act of *Sloman*." Has the sheriff here done any such act of adoption?] The delivery of the warrant to the gaoler is such an act: the gaoler is the sheriff's officer: the knowledge of the gaoler is, in law, the knowledge of the sheriff. But, if the gaoler be not for this purpose the officer of the sheriff, then *Eggington* has never been in the sheriff's custody at all under the ca. sa., and must be discharged.

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LORD CAMPBELL C. J. If the case had depended on the warrant of 31st *October*, issued at the instance of the town council, the party would have been entitled to his release; for that is substantially at the instance of those at whose instance the first and second warrants issued, and who could not take advantage of their own wrong committed upon the occasion of the first arrest. But the execution creditors are entitled to detain him. The order of this Court for his discharge is received by the gaoler on the 3d of *November*: on that same day the sheriff, with whom a ca. sa. has been previously lodged, makes his warrant, the defendant being in his bailiwick; and this is lodged with the gaoler on 4th *November*. There was no reason why the sheriff should not have put his hand upon *Eggington's* shoulder, in execution of the ca. sa. The detainer was therefore lawful.

COLERIDGE J. I have already explained the principle of *Barratt v. Price*(a). That principle is not applicable here; for it merely amounts to this, that, when the sheriff having several warrants in his hands makes the

(a) 9 *Bing.* 556.

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arrest illegally, that is an illegal arrest under all the warrants. But here, after the party has been illegally arrested, and while he is in custody under that arrest, an individual, unconnected with the former proceedings, delivers to the sheriff a writ of ca. sa. What then was the sheriff to do? Was he not to execute the arrest because the gaoler had not obeyed the order to discharge? That would not have furnished him with an answer. Nor was he the less able to arrest because the warrant was to be lodged with the same keeper who had custody under the illegal arrest. There was no identity at all between the proceedings or the parties by whom they were instituted.

WIGHTMAN J. Mr. *Gray's* argument would have been applicable if the original arrest by the gaoler had been made by him in the character of officer of the sheriff. But that was not so. The principle of *Barratt v. Price* (a) is inapplicable; and there was nothing to prevent the sheriff executing the ca. sa.

Rule discharged (b).

(a) 9 Bing. 566.

(b) *Erie J.* had left the Court.

1853.

Ex parte ASPINWALL and others, Executors of *Joy*. In the matter of STURGIS *against Joy*. *Thursday, November 3d.*

CHANNELL Serjt., in last *Easter Term* (a), obtained, on behalf of the executors of *Joy*, who had taken, in his lifetime, the benefit of the Insolvent Debtors' Act, a rule Nisi for a mandamus commanding Mr. Law, one of the Commissioners of the Insolvent Debtors' Court, to cause satisfaction to be entered on the judgment entered up in the name of *Sturgis*, the provisional assignee, against *Joy*, under the warrant of attorney executed by him before adjudication, pursuant to stat. 1 & 2 *Vict. c. 110. s. 87.*, all the debts, in respect of which such adjudication had been made, having been paid. The substance of the affidavits on which he moved was: that in the year 1841 *Joy* obtained his discharge, and, before adjudication, executed the warrant of attorney required by stat. 1 & 2 *Vict. c. 110. s. 87.*, under which judgment was entered up in this Court in the name of the provisional assignee. The amount of the debts in *Joy's* schedule, unsatisfied at the time of granting the warrant, was about 12,000*l.* The insolvent was, at the time of his discharge, plaintiff

A judgment, entered up in one of the Superior Courts at *Westminster* in the name of the assignee of an insolvent on the warrant of attorney signed by the insolvent before adjudication, pursuant to stat. 1 & 2 *Vict. c. 110. s. 87.*, is not a record over which such Superior Court exercises control except in respect of irregularity in the proceedings in such Court itself: but the Insolvent Debtors' Court, alone, is to decide when satisfaction is to be entered, and for that purpose is to construe the Act judicially. Therefore, in a case where the Commissioners of that Court differed in opinion as to whether, on the true construction of the Act, satisfaction ought to be entered on a judgment so entered in the Queen's Bench, the debts having been paid, but without interest, this Court, without expressing any opinion on the construction of the Act, refused a rule for a mandamus commanding a Commissioner to enter satisfaction; and discharged with costs a rule calling on the assignee, the plaintiff on the record, to shew cause why satisfaction should not be entered up.

(a) *Friday May 6th*, before Lord Campbell C. J., Wightman, Erle and Crompton Js.

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in a Chancery suit of *Joy* against *Birch*, which continued after his discharge. Finally, in 1852, by a decree of the House of Lords in that cause, he recovered a sum of upwards of 30,000*l.*: but he died before any portion of it was paid. After his death, the amount was paid to the provisional assignee; and the executors, under stat. 1 & 2 *Vict. c. 110. s. 92.*, applied to the Insolvent Debtors' Court to cause satisfaction to be entered on the judgment, and to order the surplus to be paid to them after the principal sums of the debts were paid. The creditors claimed to be paid their debts with interest from 1841. Mr. Commissioner *Law*, before whom the case was heard, declared himself to be of opinion that, on the true construction of the Act, the creditors were entitled to interest: but he added that, as it was a point on which the Commissioners of The Insolvent Debtors' Court differed in opinion, he should suspend making any order until the executors had the opportunity of applying for a mandamus, when, as it was suggested, the opinion of this Court on the construction of the Act might be obtained for the guidance of the Commissioners.

Channell Serjt. stated the effect of the affidavits as above. [Lord *Campbell* C. J. If this were a matter in which a mandamus would lie, you have said enough to shew that it would be a proper case for a rule *Nisi*; but it is within the jurisdiction of the Insolvent Debtors' Court to say whether the debts are satisfied within the meaning of the Act. Whether they have decided rightly or wrongly, we cannot grant a mandamus commanding a court of competent jurisdiction to put a particular construction on this Act of Parliament. We should, however, be glad to give any assistance in our power to

the learned Commissioners: and it may be that, as the judgment is in this Court, you may find some means of raising the question before us under our general jurisdiction over our own records. If you can do so, you may mention the case again.]

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PER CURIAM (a).

Rule for a mandamus refused.

In *Trinity Term*, *Channell Serjt.*, on affidavits to the same effect as above stated, obtained a rule *Nisi*, calling on *Sturgis*, the plaintiff in the judgment, to shew cause why satisfaction should not be entered on the judgment, on payment of the debts in respect of which the adjudication was made, without interest.

Sir *F. Thesiger* now shewed cause. Stat. 1 & 2 *Vict. c. 110. s. 92.* provides that, if "it shall appear to the satisfaction of the said Court for the relief of Insolvent Debtors that all the debts in respect of which such adjudication was made have been discharged and satisfied, it shall be lawful for such Court, upon application duly made," "to order satisfaction to be entered on such judgment:" and the section proceeds, in similar language, to give that Court power to order the surplus to be paid over. The present rule is wrong in its form; for it calls on *Sturgis*, the provisional assignee, to shew cause why satisfaction should not be entered up, a matter in which he has no interest, and which he can neither hinder nor further. But in no shape could

(a) Lord Campbell C. J., *Wightman*, *Erle* and *Crompton J.*s.

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there be any appeal to this Court. In *Harden v. Forsyth* (a) it was held that, where the warrant of attorney, under the former Insolvent Debtors' Act, 7 G. 4. c. 57. s. 57., was void, this Court had jurisdiction to set aside the judgment. But, when the statutable requisites for entering up a judgment of this kind have been fulfilled, so that the judgment is valid, the power to regulate the manner in which execution shall issue, under sect. 87, and to enter up satisfaction, under sect. 92, are statutable powers to be exercised by the Insolvent Debtors' Court only, and without appeal. (He was then stopped by the Court.)

Channell Serjt. and Bovill, in support of the rule. It must be admitted that there is nothing in stat. 1 & 2 Vict. c. 110. to give this Court jurisdiction over this judgment. But the Court has at common law full control over its own records; and there is nothing in the Act to take away that common law jurisdiction.

LORD CAMPBELL C. J. I am of opinion that this rule must be discharged. It seems to me that the intention of the Legislature was to confine the jurisdiction over this judgment to the Insolvent Debtors' Court. If there were any irregularity in the manner in which the judgment was entered on our rolls, then we should be the proper tribunal to interfere and set it right; but when it is regularly entered up our jurisdiction ceases. The Legislature, in sect. 92, enacts that, if "it shall appear to the satisfaction of the said Court for the relief of Insolvent

Debtors" that the debts are discharged, it shall be lawful "for such Court" to order satisfaction to be entered. That refers it to that Court to say whether the debts are discharged or not. I am sorry that we cannot render our assistance to the learned Commissioners in construing the Act; but I am of opinion that we have no jurisdiction to entertain the question.

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COLERIDGE J. I am of the same opinion. When the statutable conditions precedent to the entering up of such a judgment have been fulfilled, our jurisdiction ceases. If it were not so, we might be called to interfere in every case. But the Insolvent Debtors' Court is a court created by statute with jurisdiction for particular purposes, with which we are not to interfere.

WIGHTMAN J. The warrant of attorney and judgment in this case are not under the common law; but they are founded on and regulated by statute. We cannot interfere to order satisfaction to be entered, when the Act says that it shall be done only when the Insolvent Debtors' Court are satisfied that the debts are discharged.

ERLE J. concurred.

Rule discharged, with costs.

1853.

Thursday,
November 3d.

In the matter of a plaint in the County Court of
DURHAM holden at BARNARD CASTLE, between
JOSEPH STEPHENSON, plaintiff, and EDWARD
RAINE, defendant.

The office of
parish clerk
is a heredi-
tament
within the
meaning of the
word as used
in stat. 9 & 10
Vict. c. 95.
s. 58.; and
the county
court has not
jurisdiction to
try a plaint in
which title to
that office
comes in ques-
tion.

BOVILL, in last term, obtained a rule Nisi for a prohibition in the above plaint.

From the affidavits on which the rule was obtained, and those in answer, it appeared that the plaintiff had been, de facto, chapel clerk of the parochial chapelry of *Barnard Castle* since the year 1817; that he claimed from every householder in the chapelry 4d. annually, payable at *Easter*, as by immemorial custom due to the chapel clerk; and that this plaint was brought against the defendant, a householder in the chapelry, to recover 20d., being five years arrears of this alleged customary payment. On the trial, before the judge of the county court, the defendant disputed the title of the plaintiff to the office of chapel clerk; and also disputed the title of the chapel clerk to any such customary payment; and he now made affidavit that both disputes were made bonâ fide. The judge of the county court expressed his doubts whether he had jurisdiction, and adjourned the cause, in order that the defendant might have an opportunity to apply to a superior court for a prohibition.

Cowling now shewed cause (a). The office of chapel clerk is not a franchise: it does not emanate from the Crown: that is the proper incident of a franchise; *Com.*

(a) Before Lord Campbell C. J., Coleridge, Wightman and Erle J.

Dig. Franchise (A 1.). Quo warranto would not lie for it. [Lord Campbell C. J. But in what sense does the Legislature use the word "franchise" in stat. 9 & 10 *Vict. c. 95. s. 58.*? May it not be in a more popular sense than you are putting on it?] The words are title to "any toll, fair, market, or franchise." The things with which the word is coupled are strictly franchises; and the word should be construed to mean a franchise ejusdem generis with those enumerated. Neither can this office be called a hereditament; the meaning of that word in stat. 9 & 10 *Vict. c. 95. s. 58.* may be collected from *Lloyd v. Jones* (a). [Lord Campbell C. J. That cause was decided on the ground that the question of title was not really raised. The claim of the defendant was to a right which could not possibly exist; and therefore no title to such a right could come in question.] That was so: but the Court of Common Pleas, after deciding on that ground, proceed to say that, if the right could have existed, the county court would still have had jurisdiction. *Wilde* C. J., in delivering judgment, says (b) that sect. 58 "excludes the jurisdiction in causes involving disputed claims to incorporeal hereditaments, and the claim in question is not a claim to an incorporeal hereditament. 'Hereditament' is defined in the text books of authority to signify 'all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators as chattels do' (c). It is obvious that the right claimed

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 STEPHENSON
v.
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(a) 6 Com. B. 81.

(b) 6 Com. B. 90.

(c) *Termes de la Ley, Hereditaments* (in later editions only); *Co. Litt.* 6. a

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under the custom alleged, is not a claim to an hereditament, and therefore not such as to exclude the jurisdiction of the county court." The office of parish clerk does not come within the definition; and, even if the dispute of title to it is to be taken to be *bonâ fide*, it does not oust the jurisdiction. Neither is the claim to a customary payment of 4*d.* a claim of toll, or of any thing of such a nature that the questioning of the title to it brings this plaint within the exceptions in sect. 58. (As the Court expressed no opinion on this point, the argument relating to it is omitted. *Cowling* on this point cited *In re Baddeley* (a), *Davis v. Walton* (b), and *Lloyd v. Jones* (c).)

Bovill, in support of his rule. The Legislature cannot have meant to allow the county court to try the title to an office; and the words in sect. 58 are wide enough to express their intention. The word "hereditament" comprehends offices: it comprehends "tenement;" and "tenement" includes "offices;" *Co. Litt.* 6. a.; 2 *Bl. Com.* 16, 21.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*November* 23*d.*), delivered judgment.

In this case the plaintiff sues in the county court, as chapel clerk of a parochial chapelry, against the defendant, as an inhabitant householder of the chapelry, to recover five years' arrears of an annual payment of 4*d.*, alleged to be due to him by immemorial custom. Upon the hearing before the county court judge, the defendant first denied that the plaintiff had ever been duly appointed to the

(a) 4 *Exch.* 508.

(b) 8 *Exch.* 153.

(c) 6 *Com. B.* 81.

office of chapel clerk, and, secondly, he denied that any such annual payment was due by custom to the chapel clerk. He then objected to the jurisdiction of the court. The judge adjourned the hearing of the cause, to give the defendant an opportunity to apply for a prohibition. We are now to determine whether a prohibition should be granted. Upon the affidavits, and the opinion expressed by the county court judge, we must assume that both defences are made *bonâ fide*, and that, if the cause proceeds in the county court, both defences must be there inquired into and disposed of. This being a personal action, it is *primâ facie* maintainable in the county court; but the defendant contends that it comes within the exception in sect. 58 of stat. 9 & 10 *Vict. c. 95.*, providing that "the court shall not have cognizance of any action" "in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question." In construing this language, we are of opinion that this is an action in which the title to an incorporeal hereditament comes in question. The plaintiff sets up his right to a customary payment of 4*d.* a year from every inhabitant householder in the chapelry, as holder for his life of the office of chapel clerk; and the defendant denies his title to the office. There seems to be no doubt that this office is a tenement; for it is holden, and holden for life. But, according to the legal definitions which have been referred to, as *tenements* comprehend all *lands*, so *hereditaments* comprehend all *tenements*. And, looking to the object and frame of the proviso in question, we are of opinion that the Legislature here uses the word in that extensive sense, and meant to exclude the trial of

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We therefore think that the rule for a prohibition should be absolute.

Rule absolute.

Friday,
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KEANE against REYNOLDS.

Trespass for pulling down a cottage. Plea: Not guilty, by statute. The plaintiff was convicted by three justices, under stat. 5 & 6 W. 4. c. 50., for an encroachment on a highway. The defendant, who was surveyor of the highways, pulled down plaintiff's cottage, which was what the conviction referred to, but which was not in fact an encroachment within the meaning of the Act. No warrant issued directing defendant to do the act.

TRESPASS for pulling down a house. Plea: Not guilty, by statute. Issue thereon.

On the trial, before *Martin B.*, at the last *Somerset Assizes*, it appeared by the plaintiff's evidence that his cottage was an encroachment within fifteen feet of the middle of a carriageway; but that it was a highway which had never been repaired with stones, or otherwise, but was merely a green by-lane. The defendant, who was surveyor of the highways, had pulled the cottage down in supposed execution of stat. 5 & 6 W. 4. c. 50. s. 69. The defendant, in answer to this case, proved a conviction of the plaintiff by three justices for encroaching on the highway; it was not disputed that this conviction was made before the defendant pulled the house down, and that it related to this house. The learned Judge directed a verdict for the defendant, subject to leave to move to enter a verdict for the plaintiff.

Held: that stat. 5 & 6 W. 4. c. 50. s. 69. requires the surveyor to execute a conviction under that Act, by pulling down the encroachment though there is no warrant: and that consequently the conviction, though not itself correct, was a defence to this action, as defendant was shewn to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction.

Crowder now moved accordingly. The general words of sect. 69 would apply to an encroachment within fifteen feet of the middle of any carriage way; but sect. 63 (construed by the interpretation clause, sect. 5) confines it to those carriage ways which have been repaired and maintained with stones. The defendant therefore was not in fact justified; and the conviction is not conclusive to shut out the truth. The surveyor, it is true, is, by sect. 69, required to pull down encroachments; but that means encroachments in fact. He is not bound to wait for a conviction; nor, when there is one, is he, as a matter of course, to act on it: at least, if he acts without a warrant, it is at his own peril; and in the present case there was no warrant. [Lord *Campbell* C. J. When we look at sect. 69, it appears that every conviction under it involves a judgment quod prosternatur, which the surveyor is required to execute. The surveyor, if he acts without a conviction, acts at his peril: but when there is one it is a defence, not as conclusive evidence that the alleged encroachment really was one, but on the principle that the surveyor acted in obedience to the judgment of a court of competent jurisdiction which he was bound to execute.] The conviction was also bad in form. (The argument on this point is omitted.)

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Per CURIAM (a). There will be no rule.

Rule refused.

(a) Lord *Campbell* C. J., *Coleridge*, *Wightman* and *Erle* Js.

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THOMAS WALKER *against* The YORK and NORTH
MIDLAND Railway Company.

Action against a railway company for not duly carrying fish, from *S.* to *M.*, averred to be received by the defendants at *S.* to be carried as common carriers to *M.*
Pleas: 2. That defendants did not receive the fish as common carriers: 3. That defendants received the fish on certain terms set out in the plea. Issues thereon.

At the trial, there was evidence that defendants printed many notices, declaring that

they would not carry fish except on terms relieving them from all liability, and declaring also that none of their servants had power to vary those terms; that a parcel of these notices were sent to *S.*, and served on the fish merchants there, including plaintiff: that they generally threw down the notices; and that plaintiff told the defendants' station master at *S.* that they were not of any use; after which, the fish were sent by plaintiff by defendants' railway, and were not duly carried. The learned Judge advised the jury, if they were satisfied that plaintiff was served with the notice, to infer, as a fact, that he sent the fish on a special contract embodying the terms contained in it, unless plaintiff, before he sent the fish, unambiguously dissented from the terms, and the defendants acquiesced in his dissent. Verdict for defendant on the two issues above mentioned.

Held: that the direction was, under the circumstances, right: that stat. 11 G. 4 & 1 W. 4. c. 68. s. 4. is confined to public notices; and that the jury might rightly infer, from plaintiff having special notice that fish would not be taken except on certain terms and that no one had power to vary the terms, and from his afterwards persisting in sending his fish, that he assented to a special contract to carry on these terms; and the defendants were in that case protected by this special contract, under sect. 6.

THE first count in the declaration was on a bailment of fish, delivered to the defendants as common carriers from *Scarborough* to *Manchester*, and received by them as such carriers, to be carried from *Scarborough* to *Manchester*, and there delivered for plaintiff, with due and reasonable diligence and speed, for reward to be paid by plaintiff to defendants in that behalf. Breach: for not carrying or delivering with reasonable diligence and speed.

Pleas to this count: 1. Not guilty: 2. A traverse of the averment that defendants received the fish as common carriers on the terms alleged: 3. That, before the goods in that count mentioned were delivered by plaintiff to defendants and by them received on the occasion in the said 1st count mentioned, fish being a perishable and consequently a hazardous article of traffic,

defendants had been and were carrying it at and after a reduced rate of carriage below the rate at which the defendants were by law entitled to charge for the carriage of the same, but only on certain conditions, and, amongst others, the condition thereafter specially set forth, of which plaintiff at the time the said fish in the said 1st count mentioned was so delivered to and received by the defendants as in that count mentioned, for the purpose therein in that behalf mentioned, had notice: and that defendants, before and at the time, gave notice to the plaintiff, and the plaintiff then had notice and knowledge, that, fish being a perishable and consequently a hazardous article of traffic, the defendants would carry it, at the said reduced rate of carriage, only upon the following (amongst other) conditions, namely: that the said Company would not be responsible for the delivery of fish in any certain or reasonable time, nor in time for any particular market; nor were the said Company to be required to carry or forward fish by any particular train; nor were the Company to be responsible for loss or damage arising from any delay or stoppage, howsoever occasioned. Averment: that defendants charged plaintiff for the carriage and delivery of the fish, at and after the reduced rate of charge, and that they received the said fish from plaintiff to be carried and conveyed as aforesaid, subject to and upon the terms of the said condition, and upon no other terms at variance therewith; of which plaintiff, at the time the said fish was so delivered to and received by the defendants as in that count mentioned for the purpose therein mentioned, had notice and knowledge, and thereby then assented that the said fish should be carried and conveyed by the defendants from Scar-

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borough aforesaid to *Manchester* aforesaid, and there delivered for the plaintiff, at the said reduced rate of carriage, upon the said condition and the terms thereof in that behalf aforesaid. Issue on these pleas.

There were four other counts for not carrying other fish from *Scarborough* to *London*. The pleadings on each were similar to those on the first count.

The cause was first tried before Lord *Campbell* C. J., at the sittings in *London* after last *Hilary* Term, when a general verdict passed for the plaintiff: but a new trial was granted, in order that it might be ascertained whether a notice hereafter mentioned had been served on the plaintiff or not: the defendants were to admit the rest of the plaintiff's case, and the amount of damages.

On the second trial, before *Coleridge* J., at the sittings in *London* during last *Trinity* Term, the following facts were agreed on by both sides. The plaintiff was a fish merchant at *Scarborough*. There is railway communication from *Scarborough* to *Manchester* and to *London*. The terminus at *Scarborough* is part of the defendants' railway, which communicates with other railways leading to *Manchester* and *London*. The defendants, as is usual, collect goods at their own terminus and forward them through the connecting lines to their destination; and it was admitted that the fish in question had been sent by defendants' line, and not delivered in due time, to the damage of plaintiff. The learned Judge ruled that, after these admissions, made in obedience to the rule granting the new trial, the onus lay on the defendants; and their counsel began. The parts of the evidence, material to the question discussed in banc, were as follows.

The defendants had caused a large number of notices to be printed; of which the following is a copy.

"York and North Midland Railway. Notice. Fish Traffic. Fish being a perishable and consequently a hazardous article of traffic, *The York and North Midland Railway Company* hereby give notice that, on and after the 12th *April* 1852, they will carry it at the reduced rates at present charged, or which may hereafter be charged, below the rate which the said Company is entitled to charge, on the following conditions only.

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1st. The consignor to undertake all risks of loading, unloading or carriage, whether arising from the negligence or default of this Company or their servants, or from defects or imperfections in the station, platform or other place of loading or unloading, or of the carriage, engine, train or railway, in, by or upon which the said fish may be conveyed, or from any other cause whatever.

2. This Company is not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any particular market; nor are they to be required to carry or forward by any particular train, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned.

3. Fish booked for places beyond the limits of this Company's lines will only be carried by them so far as their line is concerned on the above conditions, and afterwards delivered to some other company or person to be carried by such other company or person, upon the same terms and conditions as are herein stipulated for as regards this Company.

4. The station clerks and servants of the Company have no authority to alter or vary these conditions."

A clerk, ordinarily employed for defendants at *York*, who was called for defendants, proved that, on 2d *September* 1852,

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he was sent with a large number of these printed notices to *Scarborough*; and at *Scarborough* received, from the station master there, a list of the fishdealers at *Scarborough*. He then went down to the sands, where the fishing boats were coming in, and where consequently many of the fishdealers were assembled, and there served as many of them as he could with copies of the notice. Amongst others, he served a person whom he believed to be the plaintiff; but, as he was not then personally acquainted with the plaintiff, he could not speak very positively to the identity. On cross examination it appeared that the persons served were very angry; that many tore up the notices and said that they would not be bound by them; and that there was considerable disturbance. The station master at *Scarborough* gave evidence that, on the 3d *September*, he saw the plaintiff, who said to him: "What is the use of sending that old fellow to serve these notices? they are of no use." The fish, the subject of the first count, were sent off on that same 3d of *September*. The plaintiff himself, who was called as a witness, denied having been personally served with the notice, and denied having ever consented to be bound by its terms. The learned Judge left it to the jury to say whether there was a special contract or not. He told them that the first question was one of fact, whether the plaintiff was served with the notice; and that, if they were of that opinion, they might infer a special contract. And he advised them to draw that inference from the receipt of the notice and the subsequent sending of the goods, unless, in the interim, the plaintiff had unambiguously refused to deliver the goods on the terms of the notice, and the defendants had acquiesced in that refusal. The

jury found that there had been a service of the notice, and that there was a special contract. The verdict was entered for the defendants on the second and third issues, and the corresponding issues on the pleas to the other counts.

M. Chambers, in last *Trinity* Term, obtained a rule *Nisi* for a new trial, on the ground of misdirection.

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Watson and *Joseph Addison* now shewed cause. The direction of the learned Judge was, if exceptionable at all, too favourable to the plaintiff. The defendants, though common carriers from *Scarborough*, are not bound to continue common carriers of all articles; *Johnson v. Midland Railway Company*(a). They therefore might well refuse in future to accept fish as common carriers at all: and, if they did so, the second plea, which denies that they received them as common carriers, would be proved. But, assuming that they remain common carriers of fish, and that, as such, they might be liable to an action for not accepting fish, properly offered to them as carriers, still they are not liable in this action unless they did in fact accept the goods as carriers; *Wyld v. Pickford* (b). The question therefore which ought to have been left to the jury was: On what terms did the defendants accept those goods? But the ground of complaint against the direction is understood to be that the learned Judge said that a special contract ought to be inferred from the receipt of the notice and subsequent sending of the goods, unless the plaintiff refused to send on those terms, and the defendants assented to the refusal. This question does not really arise on the facts. The plaintiff's case was

(a) 4 *Exch.* 367.(b) 8 *M. & W.* 443.

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that he never received the notice at all ; and of course he could make no case depending on his refusal to be bound by a notice which he said he did not receive. It is true that the defendants gave evidence, which the jury believed, that plaintiff did receive the notice, and that he did say to the station master that it was of no use. But the station master had no authority to vary the terms contained in the notice ; and plaintiff was expressly informed of that want of authority. His communication to the station master therefore was not a dissent communicated to the defendants, and had no more effect than a statement to any stranger.

M. Chambers and *Cowling*, in support of the rule. In order to make a special contract, both parties must assent to its terms. There was, in this case, ample evidence that plaintiff did not intend to assent ; so that the question raised is, Whether the learned Judge was justified in directing the jury to infer a special contract, limiting the liability of the defendants, from the fact, which the jury have found, that plaintiff received the notice and afterwards sent the goods, even though he dissented in fact. It is not disputed that, at common law before the Carriers' Act (11 *G.* 4 & 1 *W.* 4. c. 68.), a jury ought to have inferred a special contract to carry on the terms contained in any notice brought home to the customer before the goods were delivered. The law in that respect is stated accurately in *Story on Bailments* (1st edition) p. 356. sect. 557. And it is not disputed that an actual assent by the customer to the terms contained in any notice will still constitute a special contract ; and that assent may be proved in any manner. But stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 4. restrains the effect of notices ; and now the inference to be drawn

from the sending of goods to be carried, after being affected with a notice, is to be drawn from the notice and the effect of the Act combined. If the remuneration offered is adequate for the common carrier's risk, the carrier must carry the goods, if required, as a common carrier; and if he refuses he is liable to an action. If the customer agrees to a contract by which the liability is different, that contract supersedes the common law liability. But the agreement must, since stat. 11 *G.* 4 & 1 *W.* 4. c. 68., be an actual agreement, and must not be inferred merely from a notice brought home to the customer. The three first sections of that Act are for the benefit of carriers. Sect. 1 enacts that carriers shall not be liable for the loss of certain articles of great value and small bulk, unless their nature be declared and a higher charge paid. Sect. 2 enacts that a notice to this effect, published in a particular manner, shall be binding on all parties, without proof of its having come to their knowledge. Sect. 3 provides that, unless such a notice be published in that particular manner, the carrier shall not have the benefit of that Act. Then comes sect. 4, by way of proviso upon those three sections. It provides that "no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any" public common carriers by land, "for or in respect of any articles or goods to be carried or conveyed by them; but that all" such carriers shall "be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made or given contrary thereto, or in anyways limiting such liability, notwithstanding." This section deprives carriers of any benefit they might

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previously have derived from a notice or declaration limiting their liability; the uncertainty of the proof of such notices being brought home to the customer's knowledge having rendered such benefit of a doubtful character, and being one of the causes leading to the passing of the Act. Sect. 6 unquestionably preserves the full effect of special contracts; but such special contracts must mean actual contracts where the assent of the customer in fact is proved; for instance, by his signing a receipt acknowledging the terms, as in *Shaw v. York and North Midland Railway Company* (a) and the other cases respecting the carriage of horses. This seems the only mode of reading sects. 4 and 6 consistently together. To say that a special contract, within sect. 6, ought to be inferred from the previous service of a notice is to make sect. 4 of no avail; for before the Act the effect of a notice was no more than that a contract was inferred from its being brought home to the customer. There is nothing in the Act to except notices personally served from its general terms. In the present case, there is nothing but the statement in the notice to shew that the terms of carriage were reduced; and nothing even there to shew that the remuneration charged was not ample for the common law risk. [Lord Campbell C. J. The Act is confined to public notices, and has no reference to a special contract inferred from a private notice personally served.] Here the notice is a public one, addressed to no individual in particular, but such as might be affixed in the office. The mode of publication, whether by fixing it in the office or by advertisement, can make no difference. Neither can the mode in which it is brought home to

(a) 13 Q. B. 347. See *Austin v. Manchester, Sheffield &c. Railway Company*, 16 Q. B. 600; *Fowles v. The Great Western Railway Company*, 7 Exch. 699.

the customer, whether by his seeing it in the office, or in a newspaper, or being personally served. The language of sect. 4 in these respects is general; and the intention of the Legislature seems equally so. In *Crouch v. North Western Railway Company* (a) a notice was personally served on the plaintiff; yet the Common Pleas refused to enter the verdict for the defendants. The Court therefore, in that case, must have held that a special contract was not to be inferred from the personal service of a notice and the subsequent sending of the goods. At all events it was a misdirection to tell the jury they ought to infer a contract though the plaintiff did not agree, unless the defendants agreed to his disagreement. There must be two assents to make a contract.

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Lord CAMPBELL C. J. I am of opinion that this rule must be discharged. It seems to be contended by Mr. Cowling that, since stat. 11 G. 4 & 1 W. 4. c. 68., it is not lawful to make a special contract limiting the liability of a carrier; but I am clearly of opinion that the Legislature had no such intention, and that such is not the operation of the act. Sect. 4 in effect says that a carrier shall not limit his liability merely by a public notice, but leaves it open to him to limit his liability by a special contract. In the present case, the declaration alleges that the defendants received the goods as common carriers with a common law liability. The second plea says that they did not receive them on those terms; and the third plea that they received them on certain conditions. Is there not evidence that the defendants had not received them on the terms alleged, which is the second issue, and that there was a special

(a) Common Pleas, 19th April 1852; 19 *Law Times*, 90; not reported elsewhere.

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contract, which is the third? The jury found that one of those printed papers had been personally served on the plaintiff, and that subsequently he delivered the goods to be carried by the defendants. I think that evidence justifying a jury in inferring that the goods were received under a special contract to carry on the terms contained in that paper. How then was the question left to the jury? I think most correctly. On the former trial before me, a verdict was found for the plaintiff, on the supposition that the paper had not been served on the plaintiff; but a new trial was granted, in order to ascertain how that fact was, and to ascertain that only. At the present trial, the Judge first left it to the jury to say how that fact was; he then proceeded, not to tell them as a matter of law that, if that fact was as alleged by the defendants, they must find a special contract; but that, in that case, it was a question for them whether they would infer a special contract. He then went on to tell them that they ought to draw that inference, not telling them that as a matter of law, but telling them that in their place he would draw that inference, unless in the interval the plaintiff had signified his refusal to be bound by those terms, and the defendants had acquiesced in that refusal. Now in this case there could be no such acquiescence; for there was no one, at *Scarborough*, having authority to receive the goods on any other terms; and the plaintiff had, in the paper served on him, been expressly told that no one had any authority to do so. I think therefore that, as the jury, though not necessarily bound to infer a special contract, were at liberty to do so, the direction was correct, and the verdict on both pleas right.

WIGHTMAN J. The question is, Whether there was

any evidence from which the jury might find a special contract. It is not raised quite in that form; but that is the substantial question. The defendants had served the plaintiff with a notice that, in consideration of their carrying fish at reduced charges, they would require their customers to agree to certain conditions on which, and on which only, they would carry fish; and they also state in the notice that no servant of theirs has power to alter these terms. The question is, Whether the fish in question was received under a contract to carry on these terms. Now the plaintiff did not assent in express words to these conditions: on the contrary, he objected to them; but still, for all that, he sent the goods, knowing that no servant had power to alter the conditions, and that they would be accepted on those conditions only: and I think he must be taken to have sent them on these terms unless there was something in the law to prevent the conditions from binding. Mr. *Cowling* contends that there is such a law, and that stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 4. prevents this notice from affecting the liability of the defendants as carriers: but I do not think that such is the effect of the Act. It is confined, I think, to public notices, such as were very common before the Act; notices addressed to the public at large, raising a question, in every case, whether the notice was brought home to the particular person; I do not think it applicable to a notice specifically delivered to a particular person to form the basis of a special contract with him. The Judge told the jury that, if such a notice was specifically delivered to the plaintiff, unless it could be shewn that he dissented from those terms, and the defendants acquiesced in his dissent, they ought to infer that the plaintiff, persisting in sending the goods, assented to their being taken on the terms. I think so too. If a

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man is told that goods will not be received except on certain terms, and notwithstanding this he will send the goods, I think that he must be taken to agree that they shall be taken on these terms. Stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 6. expressly saves special contracts; and I think Mr. *Cowling* hardly contended that a special contract might not be proved by a letter sent to an individual addressed to him, and a subsequent delivery of the goods, though, if such a notice is in the shape of a circular, he says it is within sect. 4. But I think sect. 4 is limited to public notices, advertised or put up in an office.

COLERIDGE J. I shall add nothing as to my own ruling in this case; but I shall confine myself to the effect of stat. 11 *G.* 4 & 1 *W.* 4. c. 68., which is of general importance. It is well known that before that Act the common law liability of carriers pressed heavily upon them in respect to articles of great value, for which they received a small remuneration. The Legislature therefore interfered, and, as to those articles, provided a mode by which the carriers might secure themselves from such liability; and at the same time it took away the imperfect and vexatious mode, which had been adopted by carriers, of limiting their liability by public notices, a mode which, as every lawyer knows, led to much and vexatious litigation. Therefore the Legislature, by sect. 4, says they shall not limit their liability by any "public notice or declaration." But, by sect. 6, it goes on to say that nothing shall affect any special contract. The Legislature says nothing as to the mode in which such a special contract shall be made: it is not required to be in writing or signed; nor is there any other formal requisite: so that in every case it must be

a question of fact whether there was such a contract. In the present case, the notice was a public notice: but a copy was sent to the plaintiff, and might form the basis of a special contract. I think that, when he afterwards brought his goods and sent them at the reduced rates, it was sufficient evidence that he assented to the terms. It is true that, on the same day, he grumbled at those terms: but, as this was addressed only to the station master, who had, as the plaintiff knew, no power to vary them, I think it goes for nothing.

Rule discharged (a).

(a) *Erie J.* had gone to Chambers.

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LEONARD WARRINGTON *against* JOHN EARLY,
the elder.

Saturday,
November 5th.

THE first count in the declaration alleged that defendant, on 30th *January* 1850, by his promissory note now over-due, promised to pay plaintiff or his order, six months after date, 1000*l.*, with lawful interest thereon from the date thereof, but did not pay the same.

Pleas. 1. To first count: That defendant did not make the note. Issue thereon.

2. To first count: "That, after the alleged making of the said note, and before this suit, and before the said note fell due, it was materially altered, without the consent of the defendant, by a person, not the defendant, writing thereon, at the request of the plaintiff, words purporting that the amount of the said note was to be paid with interest at the rate of six pounds per centum per annum: whereas, when the said note was made by the defendant, it purported that the amount thereof was payable with interest at the rate of only five pounds per

A promissory note was made, payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added, in the corner of the note, "interest at six per cent. per annum."

Held: that this addition materially altered the contract; and that the holder could not recover on the note against the maker.

1853. centum per annum." Replication : De injuriâ. Issue thereon.

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Other issues of fact arose, which became immaterial.

On the trial, before *Crompton J.*, at the last *Oxfordshire* Assizes, the plaintiff produced the note ; of which the following is a copy.

“ £1000 : 0 : 0. *Wheelock, January 30th 1850.*

Six months after date, we jointly and severally, and each two of us jointly, promise to pay to Mr. *Leonard Warrington*, or order, one thousand pounds, with lawful interest from the date hereof, for value received.

Interest at six per cent.
per annum.

John S. Leake.

Chas. Leake.

John Early, Senr."

The defendant's signature was proved. It appeared that the words "Interest at six per cent. per annum" were, after the note had been signed by the three parties, added under the following circumstances. The plaintiff received the note from *John S. Leake* and *Charles Leake*, the defendant *Early* not being present. The plaintiff required an explanation of the words "lawful interest" in the body of the note. And finally *John S. Leake*, the defendant still being not present, added the words in question. Under the direction of the learned Judge, a verdict was then found for defendant on the issue on the second plea, and for the plaintiff on the issue on the first plea. Leave was reserved to move to enter a verdict for plaintiff on the issue on the second plea ; and it was agreed that, if any question of fact ought to have been left to the jury, the Court should be at liberty to deal with it.

Keating now moved accordingly (a). The memorandum in the corner of the note is no part of the note; and therefore the insertion of it does not affect the instrument, as it would if the insertion had been in the body of the note. [Lord *Campbell* C. J. If these words had been written in the corner, before the note was signed, would they not have concluded the makers as to the amount of interest?] They would not. The interest contracted for in the note is "lawful interest." The allegation in the plea, that the note purported that the amount of interest to be paid was five per cent., is not supported, unless indeed lawful interest can be said to be five per cent. In *Exon v. Russell* (b) a note was made with the words "at Messrs. *Brown, Cobb, and Co.* Bankers, *London*," in the corner: but it was held a variance to describe the note as made payable at the bankers'. [Lord *Campbell* C. J. In that case the words were not, from their general acceptance, a part of the contract. But what can the words here mean except that six per cent. interest is to be paid?] Occurring where they do, they are not incorporated in the contract: had the plaintiff declared on the note as payable with six per cent. interest he would have been nonsuited. [Lord *Campbell* C. J. I think not, if the words had been there with defendant's privity. *Erle* J. It seems to me that, if they were there before the note was signed, they would form part of the contract.] The rule must be the same respecting these words as it would be respecting a place of payment. Had a place been named in the body of the note, that would have

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v.
EARLY.

(a) Before Lord *Campbell* C. J., *Coleridge*, *Wightman* and *Erle* Js.

(b) 4 M. & S. 505.

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been part of the contract, but not if the place were only named by a memorandum in the corner.

Cur. adv. vult.

Afterwards, in this term (23d *November*), Lord CAMPBELL C. J. delivered the judgment of the Court.

In this case there will be no rule. The alteration was fatal. The note was made, payable at six months after date, with lawful interest. The holder, the present plaintiff, is a party to the addition, in the corner of the note, of the words "interest at six per cent. per annum." That, we think, was made part of the contract: had it been inserted in the body of the note it would have unquestionably been so: and, though it was inserted in the corner, if that had been done before the note was signed it would have bound the maker, inasmuch as the effect of a written contract is to be collected from all within the four corners of the instrument. When it is said that the naming of a place of payment in the corner does not make that a part of the contract, that is not on the principle that, because the writing is in the corner, it therefore cannot form part of the contract, but because what is there written is, from mercantile usage, a mere memorandum, for the convenience of parties. We think, therefore, that there has been here a material alteration of the contract, made by the holder: and that the verdict ought not to be disturbed.

Rule refused.

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JANE ELLIS *against* The SHEFFIELD Gas
Consumers Company.

Monday,
November 7th.

COUNT for unlawfully digging a trench in a public street and highway, and heaping up stones and earth, excavated from the said trench, upon the said street and highway, so as to obstruct it, and to be a common public nuisance; whereby plaintiff, lawfully passing along the said public street and highway, fell over the said stones and earth, so heaped up as aforesaid, and broke her arm.

Plea: Not guilty. Issue thereon.

On the trial, before *Wightman J.*, at the last *York Assizes*, it appeared that the defendants had made a contract with persons trading under the firm of *Watson, Brothers*, of *Sheffield*, by which *Watson, Brothers*, contracted to open trenches along the streets of *Sheffield* in order that the defendants might lay gas pipes there, and afterwards to fill up the trenches and make good the surface and flagging. *Watson, Brothers*, did accordingly, by their servants, open the trenches along one of the streets in question, and, after the pipes were laid, proceeded to fill up the trench and restore the flagging. In doing so, the servants of *Watson, Brothers*, carelessly left a heap of stones and earth upon the footway; and the plaintiff, passing along the street, fell over them and broke her arm. Neither the defendants nor *Watson, Brothers*, had any legal excuse for breaking open the street in the manner described, which was a public

Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong.

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nuisance. It was objected, for the defendants, that the cause of the accident was the negligence of the servants of the contractors, *Watson, Brothers*, for which the defendants were not responsible. It was answered that the contract was to do an illegal act, viz. to commit a nuisance; and, that being so, that the defendants were responsible. The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants.

T. Jones now moved accordingly. The defendants cannot be responsible for the act of the servants of their contractors; *Overton v. Freeman (a)*. [Lord Campbell C. J. In that case the parties made a contract to do a lawful act; for they were authorized to pave the streets: and the nuisance arose from the negligence of the sub-contractor, who, when he was negligent, was not doing what he was employed to do. But here *Watson, Brothers*, by the contract bound themselves to the defendants to commit a public nuisance. Do you say that a person who employs another to do an illegal act is not responsible for that act, unless the relation of master and servant exists between him and the actual tortfeasor?] Yes; a man is in no case answerable for the act of a contractor's servants; *Knight v. Fox (b)*. [*Erle J.* In that case the wrong complained of was negligence; and the defendant had not employed the contractor to be negligent. But it seems to me that, if trespass were brought for breaking a man's close, and the facts were that the plaintiff's fields had been ploughed up by persons who had contracted with the defendant to

(a) 11 *Com. B.* 867.

(b) 5 *Exch.* 721.

plough it at so much an acre, the verdict on Not guilty should pass for the plaintiff, inasmuch as the defendant had employed the men to commit the trespass. I should however like to know exactly how the facts were here. I suppose the contract was made as if the defendants had a right to open the street. Was the cause of the accident the opening of the street which the defendants had employed *Watson, Brothers*, to do? Or was it some act of negligence which would have been a nuisance even supposing the defendants had a right to open the street? If it was the latter, it may be a question whether the defendants can be said to have employed *Watson, Brothers*, to do the act which has been the cause of the damage.] There is no ground for the distinction between a contractor employed for one purpose or another. In *Peachey v. Rowland (a)* such a distinction seems to be hinted at; but there is no authority for it. In no case are the servants of the contractor the servants of the contractee; and a man is not liable for the acts of another person's servants.

Lord CAMPBELL C. J. I am of opinion that there should be no rule in this case. Mr. *Jones* argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful:

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(a) 22 L. J. N. S. C. P. 81. Hilary Term 1853.

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the relation of master and servant did not subsist between the employer and those actually doing the work : and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all ; they employed *Watson, Brothers*, to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance : and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done.

COLERIDGE J. concurred.

WIGHTMAN J. It seems to me, as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited. But for the direction to break up the streets, the accident could not have happened : and, though it may be that if the workmen employed had been careful in the way in which they heaped up the earth and stones the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident.

ERLE J. I agree that there should be no rule, on this specific ground that, as I understand the facts, the

cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; and that in my opinion makes the distinction between the present case, and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself.

Rule refused.

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Company.

JOSIAH BARTLETT, clerk *against* GEORGE HENRY
KIRWOOD, clerk. Tuesday,
November 8th.

THIS was an action of assumpsit, commenced 11th February 1852, to recover 350*l.* for money had and received. Plea: Non assumpsit. Issue thereon.

On the trial, before Lord Campbell C. J., at the *Middlesex* Sittings after *Hilary* Term 1853, a verdict was found for the plaintiff for 350*l.* damages, subject to the opinion of this Court upon a case which, so far as regards the points discussed, was as follows.

On 1st November 1846, there was, and still is, a district chapel at *Ivington* called *Saint John's*, in the parish of *Leominster*, in *Herefordshire*. The chapel

In proceedings, under stat. 1 & 2 Vict. c. 106., for the sequestration of a benefice for non-residence, it is not necessary that the Bishop's monition, under sect. 54, should be preceded by a citation or other warning to the incumbent.

Where the incumbent, in answer to such monition, sends a return

assigning an excuse for non-residence which the Bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the Bishop to make an order upon the incumbent to return into residence within thirty days.

Where the incumbent, being served with such order, sends to the Bishop, upon affidavit, an excuse for not obeying the order, which the Bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the Bishop to sequestrate the benefice after the lapse of the thirty days.

Under sect. 58 a benefice becomes void if it remain, for the space of a year, under sequestration for non-residence; the year commencing from the date of the decree of sequestration; the case not falling within sect. 120, which provides that for all purposes of the Act, except as therein otherwise provided, the year shall commence on 1st January and be reckoned to 31st December, both inclusive.

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then was and still is in the diocese of *Hereford*. It then was, and still is, a perpetual curacy; and, as such perpetual curacy, it then had and still has annexed and of right belonging to it a certain annual stipend of 100*l.*, and also certain fees, dues, profits and emoluments, amounting yearly to the sum of 6*l.* The plaintiff then had been duly presented and nominated by the patron of the said curacy to the Bishop of *Hereford*, and had thereupon then been duly and canonically licensed to the said curacy, and had then been duly and canonically instituted, and duly and canonically, by the said Bishop, inducted into and invested with all the rights, members and appurtenances thereto belonging, and, amongst other things, to all the fees, dues, profits and emoluments aforesaid. And he was then, and still is, perpetual curate of the said benefice, and entitled to all the fees, &c., and all rights, members and appurtenances annexed to and belonging to the said curacy, if the proceedings hereinafter mentioned do not deprive him thereof.

On 16th *November* 1846, the plaintiff was sentenced by this Court to two years' imprisonment for a misdemeanour, that is to say a libel: and, on the same day, was committed to prison: and he remained and continued in prison, under such sentence, until and upon 16th *November* 1848; during which time the said cure was duly served by a curate acting in the premises, previously appointed by the plaintiff and approved of by the Bishop.

On 22d *December* 1846, the Bishop of *Hereford* caused to be issued, under his hand and seal, and duly served upon the plaintiff, the following monition.

"*Thomas*, by Divine permission, Lord Bishop of *Hereford*: To *Josiah Bartlett*, clerk, incumbent or curate

of the perpetual curacy of" &c., "within our diocese of *Hereford*, greeting. It appearing to us that you, the said *J. Bartlett*, being a spiritual person holding a benefice within our said diocese, and not having a licence to reside elsewhere, nor having any legal cause of exemption from residence, do not sufficiently, according to the true intent and meaning of an Act made" &c. (1 & 2 *Vict. c. 106.*, "To abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy"), "reside on such benefice. We do thereupon, in pursuance of the said Act, by this our monition, issued to you as such spiritual person, require you forthwith to proceed to and reside in such benefice, and perform the duties thereof, and to make a return to this our monition within forty days after the issuing hereof. Given under our hand and episcopal seal, this 22d day of *December*, in the year of our Lord 1846, and in the 10th year of our consecration.

"*Thomas Hereford* (L. s.)."

On 28th *January* 1847, the plaintiff made and transmitted to the Bishop the following return to the said monition.

"To the Right Reverend *Thomas*, by Divine permission, Lord Bishop of *Hereford*, greeting.

"I, *Josiah Bartlett*, clerk, incumbent of" &c., "diocese of *Hereford*, having received your Lordship's monition, requiring me to reside on my benefice aforesaid, do hereby, in reply or return to such monition, make answer and say: That there is no house of residence belonging thereto. And I further say, as advised, that I have a legal cause of exemption from residence, by

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1853. reason of my forcible detention" &c. The return then referred to the sentence of this Court, impugning the same, and adding that it was the plaintiff's intention to appeal against the judgment, and that he had applied for the Attorney General's fiat for a writ of error; and that, if the Bishop should issue his order for the plaintiff's return into residence, the plaintiff would apply to this Court for a prohibition. The return further complained of the mode in which another charge against plaintiff had been entertained by the Bishop.

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There was not, nor is there, any house of residence belonging to the benefice. The plaintiff had not in fact resided on the benefice since 16th *November* 1846; he having from that day, until and upon 16th *November* 1848, been confined as a prisoner in the Queen's Prison, under the sentence aforesaid. On 10th *March* 1847, the Bishop caused to be issued, under his hand and seal, and to be duly served on the plaintiff, the following order to reside.

"*Thomas*, by Divine permission, Lord Bishop of *Hereford*.

"To *Josiah Bartlett*, incumbent or curate" &c. The order recited the monition, and service thereof, and the return to it. "And whereas the reasons stated by you in the said return for your non-residence are deemed by us unsatisfactory: Now we do, by this our order in writing, under our hand and seal, require you, the said *Josiah Bartlett*, to proceed to and reside on your said benefice, within thirty days after this order shall have been served upon you, in like manner as by the said Act is directed with respect to the service of monitions. Given under our hand and episcopal seal" &c., 10th *March* 1847.

On 14th *April* 1847, plaintiff made and transmitted to the Bishop the following affidavit, made and sworn by the plaintiff.

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"In the Consistorial Court of the Right Reverend *Thomas*, by Divine permission, Lord Bishop of *Hereford*.

"*Josiah Bartlett*, clerk, incumbent" &c., "in the diocese of *Hereford*, having received an order in writing for his return into residence within thirty days from the 17th day of *March* last past, maketh oath and saith: that he is still prosecuting the writ of error referred to in his return to the monition issued on the 22d day of *December* 1846, to reverse the judgment which has been pronounced against him in the Court of Queen's Bench." "That the delay which has arisen has been caused" &c. (assigning reasons). "That he received an opinion in writing, dated the 8th day of *April* instant, from the learned counsel who has been intrusted with his case, that he, the said learned counsel, had no doubt but that upon the argument before the Attorney General the writ of error will be granted. And this deponent saith that, upon the issuing of the said writ, he will be enabled to obey the said order in writing, for his return into residence."

(Sworn 13th *April*, 1847.)

The affidavit was inclosed in a letter addressed by the plaintiff to the Registrar of the diocese, in which it was termed "an affidavit sworn by me in reply to the order in writing of the Lord Bishop of *Hereford* for my return into residence, conformably with provisions of 112th section of the 1st & 2d *Vict. c. 106*."

Before the swearing of the said affidavit, the Attorney General had refused to grant his fiat for the issuing of any writ of error; and no such fiat has ever since been

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issued. But the plaintiff, at the time of swearing the affidavit, was bonâ fide endeavouring to obtain a rehearing of the decision of the Attorney General, and had taken steps for that purpose. No application for such rehearing was however in fact made to the Attorney General. On 27th *May* 1847, the plaintiff was duly served with the following writ of sequestration, under the seal of the Consistory Court of the said diocese.

“*Waties Corbett*, clerk, Master of arts, Vicar general and Official principal of the Right Reverend Father in God, *Thomas*, by Divine permission, Lord Bishop of *Hereford*, lawfully constituted: To *Thomas Evans*, of the city of *Hereford*, Gentleman, greeting. Whereas” &c. The writ recited the order of 10th *March* 1847; that it was served upon plaintiff on 17th *March* 1847, and returned into the Consistorial Court with an affidavit of the time and manner of service. “And, although thirty days from the time of such service of the said order have elapsed, yet the said *Josiah Bartlett* hath not complied with the said order, nor have sufficient reasons been stated and proved for the non-compliance therewith. We therefore, the said *Waties Corbett*,” &c. The writ then decreed the sequestration of the profits of the benefice, until the order to reside should be complied with, or sufficient reason for non-compliance therewith should be stated and proved: and it constituted *Evans* sequestrator, and charged him to sequestrate, &c., and pay and apply &c. “In witness whereof, we have caused our seal of office to be hereunto affixed, the twenty sixth day of *May*, in the year of our Lord 1847.

“*Waties Corbett* (L. S.).”

The case then set out certificates of the above proceedings, and also of the sequestration being served on plaintiff on 27th *May* 1847; which sequestration was returned into the Court, with affidavit of service, on 29th *May* 1847; and a certificate of a true copy of the sequestration being affixed on the church door on 6th *June* 1847. These certificates were duly entered in the Book of Acts of the Consistorial Court.

On 27th *May* 1847, the plaintiff sent notices to the Bishop and Registrar of his intention to appeal against the sequestration. And, on 21st *June* 1847, he appealed to the Archbishop of *Canterbury*.

The proceedings in the appeal were set out in the case; and it appeared that on the 12th *October* 1847, the Archbishop adjudged against the appeal.

On 17th *November* 1848, the Bishop of *Hereford* gave notice in writing, under his hand, to the Reverend *George Albert Rogers*, the patron of the perpetual curacy, to the effect that the benefice was sequestrated on 26th *May* 1847, and had become void by reason of its having continued under sequestration for the space of one whole year. The notice was served on the patron on 20th *November* 1848.

On 25th *November* 1848, the defendant, upon the nomination and presentment of the patron of the curacy, was duly and canonically licensed to, and duly and canonically instituted and inducted into, the perpetual curacy; and was then, and from thence hitherto hath been and still is, duly and canonically invested with all and singular the rights, members and appurtenances thereunto belonging, if the proceedings hereinbefore mentioned did deprive the plaintiff thereof.

The defendant had, since his licence and institution,

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received the sum of 318*l.*, being the amount of three years of the said annual stipend, and also of the fees, dues, and profits and emoluments of the said perpetual curacy during the period last aforesaid.

Before the commencement of this suit, the plaintiff demanded of the defendant the said sum of 318*l.*; which he then refused and still refuses to pay.

Between the service of the order to reside and the issuing of the writ of sequestration, there was sufficient time for the plaintiff to have shewn cause against the issuing of such writ. And the plaintiff, although in prison during that time, was in free and constant communication with his legal advisers, and had it in his power to shew cause against the issuing of such writ: but neither before the issuing of the monition, or of the order to reside, or of the writ of sequestration, was any citation, order or summons to shew cause why they or any of them should not issue served on the plaintiff, otherwise than as appears by the documents above set forth. Nor, otherwise than as appears by the facts and documents above stated and set forth, was he, before they respectively issued, heard in his defence why they, or any of them, should not issue. The plaintiff, in *Michaelmas* Term 1848, applied to this Court (*a*), and also to the Court of Exchequer (*b*), for a rule calling upon the Bishop of *Hereford* to shew cause why a prohibition should not issue to restrain him from giving notice to the patron of the perpetual curacy of *Iwington*, under stat. 1 & 2 *Vict. c.* 106. *s.* 58., that the benefice was void: but he did not, on either of such occasions, or at any other time until the delivery of the

(*a*) *Ex parte Bartlett*, 12 Q. B. 488.

(*b*) *In re Bartlett*, 3 Exch. 28.

judgment of the Court of Exchequer-Chamber in the case of *Bonaker v. Evans* (a), make it a ground of complaint or objection that he had not had an opportunity of being heard in his defence previously to the issuing of the writ of sequestration.

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In 1851, the plaintiff also brought an action against *Evans*, the sequestrator of the said benefice, to recover the profits of the said benefice received by the said sequestrator; in which action he was nonsuited. Application was afterwards made by the plaintiff to set aside that nonsuit; but the Court refused to grant a rule *Nisi*; and, after such refusal, the present action was commenced.

The Court is to have the same power as a jury of drawing inferences from the above facts and documents.

The question for the opinion of the Court is: Whether, under the circumstances set forth, the benefice aforesaid was void on the 25th *November* 1848. If the Court shall be of opinion that the benefice was not void on the said day, then the verdict entered for the plaintiff is to stand for 318*l.* damages, besides costs of suit. And if the Court shall be of a contrary opinion, then such verdict is to be set aside, and in lieu thereof a nonsuit or verdict for the defendant is to be entered, as the Court may direct.

Channell Serjt., for the plaintiff (b). It is not proposed to impeach the propriety of the Bishop's decision,

(a) 16 Q. B. 162.

(b) The argument had been commenced in last *Trinity* Term (*June* 7th 1853): but, the Court not having then been constituted as at present, Lord *Campbell* C. J. directed that the case should be now recommenced *ab initio*.

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sequestrating the benefice, if the proceedings are regular (a). But the proceedings are not regular under stat. 1 & 2 Vict. c. 106. The first objection is that the plaintiff received no summons, citation or warning before the issuing of the monition, or of the order to reside, or of the sequestration. The principal question as to this is, whether the monition, with which the proceedings originated, ought to have been preceded by a citation, or something of that kind. In *Bonaker v. Evans* (b) it was decided by the Court of Exchequer Chamber that a sequestration could not legally issue till after notice to the incumbent to shew cause why it should not issue. There *Parke* B., delivering the judgment of the Court, said: "as a measure of precaution, it may prevent an objection hereafter if even the monition be preceded by a notification to the incumbent of the charge against him, in the nature of a summons to shew cause; for even the monition has a penal character, as the incumbent is, by sect. 55, bound to pay the costs of it at all events, and the Bishop acts judicially in issuing it by sect. 54." [Lord *Campbell* C. J. Was that more than a piece of friendly advice?] The decision undoubtedly proceeded upon the objection to the sequestration: but the objection to the monition is of the same kind; and the remark therefore was suggested by the principle of the decision, and can scarcely be called extra-judicial. In *Bonaker v. Evans* (b) the incumbent admitted the validity of the monition by commencing residence: here the incumbent did not, and in fact could not, do so: this case is therefore stronger than the other, where something like a waiver might have been implied.

(a) See *Ex parte Bartlett*, 12 Q. B. 488; *In re Bartlett*, 3 Exch. 28.

(b) 16 Q. B. 162. 175.

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Sect. 54 gives a judicial character to the monition: the Bishop is to act upon its appearing to him that there is a non-residence according to the true meaning and intent of the Act, without licence or legal cause of exemption. The consequence of it is that, by sect. 55, the party monished must pay costs though the living be not ultimately sequestered. [*Coleridge J.* That is if, when the monition issues, he is absent, contrary to the Act, but obeys the monition, and, "by reason of such obedience," the profits are not sequestered.] He is thus fixed with such a liability as shews the proceeding to be judicial. [*Erle J.* He is liable in the case where the monition has issued properly. But, if he was in residence, or had a legal exemption, when the monition issued, he would not have to pay costs.] Still the monition, which places him in a position where the liability may accrue, is judicial. It does not lose that character from the circumstance that in a particular event the liability will not arise. [*Lord Campbell C. J.* It cannot come to more than a mandamus.] It commences formally: "It appearing to us:" not simply "We are informed." [*Coleridge J.* It orders the incumbent to reside and make a return: he might make a return denying the non-residence.] The Bishop must have evidence before him, previously to his issuing the monition: that evidence ought not to be taken without notice to the party complained of. It is not necessary, for the plaintiff, to contend that in every event the effect of the monition is judicial.

The second objection is, that the documents do not, on their face, shew facts giving jurisdiction. This, however, rests virtually upon the first objection, the

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omission insisted upon being that the monition is not shewn to be warranted by a previous citation.

The third objection is that the writ of sequestration has not issued in the name of the Bishop, nor under the seal of the Consistorial Court.

A fourth and a fifth objection have been taken, for the purpose of insisting upon the validity of the plaintiff's return to the monition. But these are not pressed.

The sixth objection is, that the benefice had not continued under sequestration "for the space of one whole year," within the meaning of stat. 1 & 2 *Vict. c. 106. s. 58.*, and therefore has not become void; and the presentation of the present defendant is therefore invalid. Sect. 120 enacts: "That for all the purposes of this Act, except as herein otherwise provided, the year shall be deemed to commence on the first day of *January*, and be reckoned therefrom to the thirty-first day of *December*, both inclusive." The sequestration issued on 26th *May* 1847: the statutory year would therefore expire on 31st *December* 1848. But the notice, declaring the living void, is of 17th *November* 1848; and the defendant was inducted on 25th *November* 1848. On this point *Sharpe v. Bluck* (a) is a direct authority.

Keating, contra. First, as to the necessity of a citation before the issuing of the monition. The dictum at the end of the judgment in *Bonaker v. Evans* (b) was not necessary to the decision of the case. The decision was that the incumbent ought to have had an opportunity of shewing why he did not obey the order to reside,

(a) 10 Q. B. 280.

(b) 16 Q. B. 175.

before the writ of sequestration issued: that is quite inapplicable here, where it is not pretended that the incumbent had not such an opportunity; for he makes an answer of 14th *April*, on affidavit (as he was entitled to do by sect. 112), referring to the order, and offering a reason for his not obeying, which the Bishop adjudges to be insufficient. The dictum in question was no more than advice; and it is founded on the erroneous assumption that the monition, under sect. 55, bound the incumbent to pay the costs at all events. This mistake has been pointed out from the Bench during the argument. The monition is mere process to which the incumbent is to make a return: he may, for instance, return that he has not absented himself. [Lord *Campbell* C. J. Or that he is absent with licence. If parishioners are monished to repair a church, they may return that it is in repair.] That case is analogous to the present: the monition has no judicial character in either case. But, further, the incumbent here has appealed from the order of sequestration to the Archbishop; and the appeal has been dismissed. That would not give validity to proceedings intrinsically void: but, being in the nature of an appearance, it cures the objection to want of summons. The case is within the principle laid down by Lord *Brougham* in *Taylor v. Clemson* (a). [Coleridge J. Suppose the incumbent had expressly made the want of a citation antecedent to the monition the ground of his appeal.] Possibly in that case the waiver would not have been implied.

As to the third objection: the sequestration is under the Judge's official seal.

(a) 11 *Cl & F.* 610. 643., in Dom. Proc., affirming the judgment of Exch. Ch. in *Taylor v. Clemson*, 2 *Q. B.* 973.

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As to the sixth objection: sect. 120 fixes the year from 1st *January* to 31st *December*, "except as herein otherwise provided." *Sharpe v. Bluck* (a) was a case under sect. 75, which authorizes the Bishop to appoint a curate if there be a certain quantity of absence in a year: for the purposes of that enactment it was necessary to define what the year was. But, under sect. 58, the Legislature had in view the mere efflux of time during which the living remained under sequestration. There is not in the Act any express provision corresponding to the exception in sect. 120: the effect of the context must therefore be looked to: the language of sect. 58 is "for the space of one whole year." Upon the construction suggested on the other side, the sequestration might continue for two years all but two days. [Lord Campbell C. J. The reason of the thing shews that that space is to be reckoned from the commencement of the sequestration.] The point might as well have been made in *Bonaker v. Evans* (b).

Channell Serjt., in reply. Even if the monition be not a judicial act, there has been no regular calling upon the incumbent to shew cause against the sequestration. His affidavit, referring to the order, does not supply the want of that. He was at any rate entitled to be heard upon the matter there shewn. [Lord Campbell C. J. The Court of Exchequer Chamber, in *Bonaker v. Evans* (b), emphatically disclaim the notion that there must be any particular formalities.] The appeal to the Archbishop cannot give validity to the order of sequestration, if it was made without hearing.

(a) 10 Q. B. 280.

(b) 16 Q. B. 162.

The Legislature might well intend that the length of time during which the sequestration must last, in order to have the effect of avoiding the benefice, should be within assigned days.

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Lord CAMPBELL C. J. I am of opinion that the defendant is entitled to our judgment. We are bound by the decision in *Bonaker v. Evans (a)*, and fully concur in that decision. The supposed delinquent must have an opportunity of being heard before there is a decision against him; and, before he is heard, it is essential that the charge should be communicated to him. At the same time, as the Court of Exchequer intimated, in which I fully concur, the Bishop is not bound to proceed with all the formalities of a court of law. The question must be one of fact. In *Bonaker v. Evans (a)* it appeared that the defendant had no opportunity of being heard against the issuing of the sequestration: and it might be supposed that, if he had been heard, he could have shewn some cause against its issuing. But here the incumbent had at every step an opportunity of being heard; and he embraced it, and was heard. There was, to be sure, no formal trial: but there were written communications; and he stated his defence over and over again: on 28th *January* he sends an answer to the monition; on 14th *April* he sends an answer, on affidavit, to the order to reside. All these communications are made by him for the purpose of shewing that he is not guilty of the neglect. He therefore had an opportunity of being heard, and was

(a) 16 Q. B. 162.

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heard: and I think the sequestration well issued. Then my Brother *Channell* very properly raises another objection: that there was no citation preceding the monition. And certainly the Court, in *Bonaker v. Evans* (a), suggested, as a measure of precaution, that there should be such a citation. My Brother *Parke* there points out that the monition has, by sect. 55, a penal character, inasmuch as the incumbent has to pay the costs at all events; and that thus the Bishop acts judicially in issuing it. But, on referring to the statute, it appears that the incumbent is not liable to costs at all events, but only if he is absent contrary to the intent of the Act: if he can shew that he is not so, he incurs no liability to costs. The monition is only in the nature of process, to put the matter into a course of investigation. It gives the incumbent, if he has offended, an opportunity of being set right on paying costs. In general practice it is not preceded by any citation; and, on looking at sect. 54, we see that its effect is merely that of process. I think therefore that there was no need of a citation. As to the question of time: it seems to me that sect. 120 cannot apply to the enactment of sect. 58. It would be most absurd if, for this purpose, the year were limited to the space from the 1st of *January* to the 31st *December*. The benefice becomes void if it "shall continue for the space of one whole year under sequestration;" that is, for any whole year. Sect. 120 is therefore inapplicable to this provision.

COLERIDGE J. I am of the same opinion. As to the

(a) 16 Q. B. 175.

last point, I have nothing to add. The general question is one of great importance. I agree that the notice need not be formal. The statute has created this tribunal and this mode of proceeding. The counsel, therefore, have wisely abstained from inquiring what a monition means in an Ecclesiastical court; for we must collect its effect from the statute. No doubt, as the consequences are highly penal, we must see that all the essential requirements of justice are satisfied. The party is to have an opportunity of knowing what is charged, and, under such a monition as this, an opportunity of obeying or of defending himself. Of the defence the Bishop is the judge. I do not think it has been urged that a party who has been heard, and found to be wrong, has a right to complain that he did not know what the penalty was to be. Of that he must take his chance; and the judgment must take its course. A man is not entitled to say, If I had known what you would do to me I would have obeyed: that might be convenient to him; but it is not called for by justice. Now what has been done here? There are three things. The monition is, I think, only process. It is immaterial what the word means in the Ecclesiastical courts: it is here only process. If the incumbent admits the charge and obeys the monition, he has to pay costs; but not so, if he disputes the charge: the costs of the monition in that case fall to the ground: the judgment in *Bonaker v. Evans* (a) rather overstated the effect of the monition. That, then, relieves the order from the objection that there was no citation before the monition: the monition being itself the citation. Then

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(c) 16 Q. B. 175.

1853. nothing more was necessary to be done till the case was heard and the order to reside was made. Then, in answer to the monition, the incumbent sends a return; and, in answer to the order, an affidavit; both of which the Bishop held insufficient answers. Now here is the distinction between this case and *Bonaker v. Evans* (a). For in that case there was something like a partial obedience of the order. Then came a letter from the Bishop's secretary, to the effect that the residence was not bonâ fide, and that, in default of residence, a sequestration would issue (b). The Court of Exchequer Chamber does not intimate that a letter, at this stage, might not have been a sufficient intimation of the charge and a sufficient notice to answer it: but they examine the letter, and say that it does not amount to that; and that the letter sent by the incumbent in answer does not give the effect of a hearing. They say that "no greater degree of form can be requisite than is sufficient to justify a superior in removing an inferior officer for delinquency, a rector, for instance, before he removes a parish clerk" (c). We are familiar with the case of a parish clerk: we require no formal proceeding; but we see that the clerk has had notice of the charge and opportunity of being heard upon it. The Court of Exchequer Chamber, therefore, upon examination of the letter, say, not that a letter cannot have this effect, but that the particular letter does not amount to such notice. The case before us thus differs entirely from that of *Bonaker v. Evans* (a).

(a) 16 Q. B. 162.

(b) 16 Q. B. 165.

(c) See *Regina v. Smith*, 5 Q. B. 614.

ERLE J. (a). I also am of opinion that there should be judgment for the defendant. I agree with my Lord on the other points: and, as to the notice, I concur in the decision of *Bonaker v. Evans* (b), and agree that the party charged must be heard. And I think the party here has been heard. It ought to be observed that sect. 54 is introduced, in addition to other penalties for non-residence, for the purpose of enforcing specific performance: and the mode of doing this is to issue a monition reciting that the absence has been made to appear to the Bishop, and ordering the incumbent to reside and make a return: and, unless cause be shewn, the Bishop may issue an order to reside; and, in case of non-compliance with such order, may sequestrate. Every step is with a view to compel residence: the proceeding is in the nature of a summons to shew cause why the incumbent should not reside, and, no cause being shewn, of a distress upon the profits. That being so, is the monition a judgment? I apprehend not. It is in form a notice, whether it be called monition, summons, warning, or any thing of the kind. It amounts to a warning that judgment will be given unless the incumbent reside or shew cause. As to costs, by sect. 55 the incumbent is liable to them only if he has been absent without just cause, and submits: if he contests, the judgment issues subsequently. The monition therefore properly issued here without a citation preceding: the incumbent answered the monition; that is, he made a return; and the answer was deemed unsatisfactory: then the order to reside issues; and upon that there is

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(a) *Wightman J.* was absent.

(b) 16 Q. B. 162.

1853. an appropriate hearing; and the sequestration issues upon that. The sequestration is, throughout the Act, treated more as a distress to compel residence than as a penalty; for, by sect. 54, the profits are specifically appropriated to the expense of serving the cure, to the payment of the expenses of the proceeding, to the sustentation of the chancel, residence house, &c., to the payment of sequestration creditors, to the augmentation of the benefice, to Queen *Anne's* bounty, &c.; or the Bishop may remit the profits to the incumbent. All is thus founded on the monition; and, at the separate stages, the incumbent, in the present case, has been heard: and it is admitted that he is non-resident. There must therefore be judgment for the defendant.

Judgment for defendant.

Tuesday,
November 8th.

KERNOT *against* CATTLIN.

Diplomas conferring degrees and honours, and certificates from medical institutions and practitioners, do not pass to the provisional assignee by the vesting order of the Insolvent Debtors' Court, under stat. 1 & 2 Vict. c. 110. s. 37.

DECLARATION: the last count was for detaining, among other things, a diploma and letter conferring a degree of Doctor of medicine, surgery and midwifery; a diploma for midwifery honours, in a black tin case; a diploma and letter conferring a degree of Doctor of philosophy and Master of arts, in a black tin case; a diploma of *The Royal College of Surgeons, London*; a certificate of *The London Vaccine Institution*; a certificate of a dentist; a cer-

tificate of the plaintiff having been for a certain time, to wit three years, a house pupil of Mr. *Dermott*, anatomical demonstrator and anatomist; and a certificate of the plaintiff's attendance for a certain time, to wit for twenty one months, as a pupil at *Guy's Hospital*.

Plea 10 stated a petition of plaintiff to the Court for the relief of Insolvent Debtors, and an order by that Court vesting the plaintiff's property in the provisional assignee; and averred that, by virtue of such order and stat. 1 & 2 *Vict. c. 110.*, "the said goods and chattels in the last count of the declaration mentioned, and all rights of action in respect thereof, then, and before the accruing of the supposed causes of action in the said last count mentioned, and whilst the plaintiff was and continued to be a prisoner in actual custody as aforesaid, became and were vested in the said provisional assignee, &c." (a). That the vesting order was still in force; and defendant, as servant and by authority and command of the provisional assignee, detained &c. The pleadings to this plea (which it is unnecessary to state further) led to a demurrer by the defendant. Joinder.

Willes, for the defendant (b). The only point which the plaintiff now makes is that some of the goods mentioned in the second count could not pass under stat. 1 & 2 *Vict. c. 110. s. 37.*, and that the 10th plea

(a) See *Kernot v. Pittis*, ante, pp. 406. 421.:

(b) The argument began on this day; when the case stood over for arrangement between the parties: but, no arrangement having taken place, the case was resumed and decided on November 15th.

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1853. therefore does not answer that count. The question therefore is, whether the goods are not part of "the real and personal estate and effects" of the plaintiff. Such articles may well have a marketable value, and be available as assets for the creditors; as, for instance, if the diploma conferred a degree upon a physician or surgeon of great historical reputation: such a memorial would undoubtedly find purchasers. [*Wightman* J. Would these documents pass to assignees of a bankrupt? Lord *Campbell* C. J. Would letters of the plaintiff's wife pass?]

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C. Mihoard, contra, was not called on.

PER CURIAM (a). We hold that the articles mentioned did not pass, under the vesting order, to the provisional assignee. They may be of value to the plaintiff; but we cannot see that they are of value in the hands of the assignee.

Judgment for plaintiff.

(a) Lord *Campbell* C. J., *Coleridge*, *Wightman* and *Crompton* Js.

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The AMBERGATE, NOTTINGHAM and BOSTON and
EASTERN JUNCTION Railway Company *against*
The MIDLAND Railway Company.

Tuesday,
November 8th.

DECLARATION: For that defendants wrongfully converted to their own use, or wrongfully deprived plaintiffs of the possession of, plaintiff's goods; that is to say, a locomotive engine and a tender thereto: and, on another occasion, wrongfully converted &c. the said engine and tender.

Plea 2. That defendants, "before and at the time of the committing the grievances in the declaration mentioned," "were lawfully possessed of a certain railway; and, because the said goods respectively were, on the occasions in the declaration mentioned, wrongfully in and upon the said railway, incumbering the same, and doing damage there to the defendants, they the defendants, on the said occasions, seized and took, in and upon the said railway, each of the said goods as a distress for the damage so by it done, and impounded the same, and kept and detained the same so impounded, as such distress, in a convenient place in that behalf: which are the grievances" &c.

Replication, so far as plea 2 relates to the grievance in the declaration first mentioned. That defendants are *The Midland Railway Company* mentioned in the Act

Sects. 115, 116 of the Railways Clauses Consolidation Act provide that no one shall use an engine on the railway of a company which has not been approved of by the company, and that a certificate of the approval may be obtained by certain steps; and that, if an engine be used on the railway without a certificate, the party using shall forfeit to the company a sum not exceeding 20*l*., and the company may remove the engine.

Held: 1. That the company has a common law right of distress damage feasant on an engine in-

cumbering the railway, if there be no certificate of approval.

2. That to a count, complaining that the company converted the plaintiff's engine to their use, and wrongfully deprived the plaintiff thereof, it is a good plea that the plaintiff demanded it for the purpose and in order that he might use it on the railway without a certificate of approval.

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&c. (8 & 9 *Vict. c. xlix.*, local and personal public, "To empower *The Midland Railway Company* to extend the said railway from *Nottingham* to *Newark* and *Lincoln*"); and, after the passing of that Act, defendants, in pursuance thereof, made a railway, being the railway in the second plea mentioned, and a portion of the railway by that Act authorized to be made; and were, before and at the time of the first occasion in the declaration mentioned, and afterwards, using the said portion for the conveyance of passengers and goods along the same by means of carriages and locomotive engines. That the part of the said railway, in and upon which the goods in the declaration first mentioned were so seized and taken as in the said second plea mentioned, was and is part of *The Nottingham and Lincoln* branch of the *Midland Railway*, in the parish of *Colewick*, between the second and third mile from the town of *Nottingham*, in the statute &c. (10 & 11 *Vict. c. ccxiv.*, local and personal public, "To empower the *Midland Railway Company* to extend the line of their *Nottingham* and *Lincoln* Railway at *Lincoln*, and to make a branch railway to their *Lincoln* station") mentioned: That plaintiffs are *The Ambergate, Nottingham and Boston and Eastern Junction Railway Company*, in that Act mentioned, and also in *The Ambergate, Nottingham and Boston and Eastern Junction Railway Amendment Act, 1847* (10 & 11 *Vict. c. lxxviii.*, local and personal, public), mentioned: and that the plaintiffs, "before and at the time of the committing of the grievances in the declaration first mentioned, brought and had the said goods in the declaration first mentioned, being a locomotive engine and tender, in and upon the said branch of the said railway, for the purpose of using the same,

and carrying and conveying upon the said branch of the said railway and elsewhere, upon the said railway, by means of carriages attached to the said engine and tender, passengers and goods, according to law, and under and by virtue of the powers and authorities in them by virtue of the statutes in that behalf vested." That the said engine and tender, and the said carriages, were properly constructed, as by The Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20.), and the special Acts of Parliament in that behalf in that Act mentioned, and other the Acts of Parliament in that behalf directed. That plaintiffs, "at and during all the times of their so bringing, using and employing the said goods and carriages in and upon the said railway, for the purpose aforesaid, and at all times, were ready and willing to pay to defendants, or other the persons entitled to the same, all lawful tolls, charges, demands and claims whatsoever in that behalf demandable from or payable by them, or any other person or persons."

Rejoinder, so far as the replication to the second plea relates to the said engine (a), "that the said engine was and is what in The Railways Clauses Consolidation Act, 1845, is called an engine : and that the plaintiffs had not, at or before the respective times of the making of the said distresses, obtained from the defendants, or applied to the defendants for, a certificate of their, the defendants', approval of the said engine, but brought the same, on each of the said occasions, on the said railway

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(a) The rejoinder, as to the tender, averred that it was fastened to the engine ; and an answer was offered similar to the answer as to the engine. Upon the argument, it was admitted that the question as to the engine and tender was the same.

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without having first obtained such certificate of approval as aforesaid, contrary to the form of the statute" &c.

Demurrer. Joinder.

Plea 3. As to the converting &c. the engine in the declaration first mentioned: That defendants are *The Midland Railway Company* mentioned &c., as in the replication to plea 2, averring that defendants, in pursuance of stat. 8 & 9 *Vict. c. xlix.*, made a railway, being a portion of the railway by that Act authorized, and were possessed of the said portion; and were, before and at the time of the first occasion mentioned in the declaration, in the habit of lawfully using the said portion for the conveyance of passengers and goods along the same, by means of carriages and locomotive engines. That, just before the said first occasion mentioned in the declaration, plaintiffs brought upon the said portion of the said railway the said engine in the declaration first mentioned, without having first obtained from defendants a certificate of their, the defendants', approval of the said engine, contrary to the form of the statute &c.; and the same, until and at the said first occasion, continued on the said portion of the said railway, without any such certificate having been obtained, contrary to the same statute. "Wherefore the defendants did, in order to remove the said engine from the said railway at the said first occasion, take the said engine, and did, on the same occasion, remove the same from the said railway, a small and reasonable distance, to a fit and convenient place in that behalf, which is the conversion above complained of; and, in so doing, did deprive the plaintiffs of the possession of the said engine as alleged, doing no unnecessary damage to the plaintiffs on the occasion aforesaid."

Replication. That plaintiffs sue, not for the said removal, or the said converting, or depriving the plaintiffs of possession of, the said engine, as in the third plea alleged and justified; but for that defendants converted to their use, or wrongfully deprived plaintiffs of, the said engine in the declaration first mentioned, otherwise than in the third plea mentioned.

Rejoinder. "As to the plaintiffs' new assignment on the third plea, the defendants repeat all the allegations in the third plea, except that which identifies the removal with the grievance complained of: and say that the engine was and is what is called an engine in The Railways Clauses Consolidation Act, 1845; and that the place to which they so removed the engine, as in the third plea mentioned, was land of and in the possession of the defendants contiguous to the said railway: and that the defendants continued possessed of the railway therein mentioned during all the times hereinafter mentioned. And that, while the engine was staying in the said place by virtue and in consequence of that removal, the plaintiffs demanded of the defendants the said engine for the purpose and in order that they the plaintiffs might, by the power of the steam of the said engine, move the said engine over and upon the said land of the defendants, towards, unto, to and upon the said railway of the defendants, and there again, on their said railway, place and use the said engine by the power of its own steam, without having first obtained or obtaining such certificate of approval as aforesaid for the said engine; contrary to the form of the statute" &c. "That, if the defendants had, in compliance with the said demand, allowed the plaintiffs to have possession of the said engine, the plaintiffs would forthwith have so, by the

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power aforesaid, moved the said engine over and upon the said land of the defendants, towards, unto, to and upon their said railway, and there again, on their said railway, placed and, by the power aforesaid, used the said engine, without having first obtained or attaining such certificate of approval as aforesaid for the said engine, and without asking or applying to the defendants for such certificate, contrary to the form of the statute" &c. "Wherefore the defendants, on the said occasion when the said demand was made, and in answer to such demand, and to prevent the said engine from being by the plaintiffs, by the power aforesaid, moved to, and placed and, by the power aforesaid, used on, their said railway as aforesaid, without such certificate as aforesaid being first obtained, contrary to the said statute, and in defence of their possession of the said railway, refused to allow the plaintiffs to take possession of the said engine; and, by then not allowing the plaintiffs to reenter on the said land, for the purpose of taking possession of the same engine, and of then moving, placing and, by the power aforesaid, using the said engine as aforesaid, without having obtained or obtaining such certificate as aforesaid, contrary to the said statute, prevented the plaintiffs from having or taking possession of the said engine: which is the grievance above newly assigned" &c.

Demurrer. Joinder.

Willes, for the plaintiffs. On the demurrer to the rejoinder to the replication to the second plea, the question is, Whether the defendants were authorized to distrain the engine damage fesant, on the ground that it was on the railway without a certificate. The case turns

on sects. 115, 116 of The Railways Clauses Consolidation Act, 1845. Sect. 115 undoubtedly enacts that no locomotive engine shall be brought on the railway unless first approved of by the company, who are to give a certificate of approval, upon being properly required: and then, by sect. 116, if any person, without a certificate, uses an engine on the railway, or, after notice given, does not remove it, he is to forfeit 20*l.*; and the company may remove the engine. The necessity for the certificate is created by the statute. There is thus a specific provision introduced, for the infringement of which there are two specific remedies provided, neither of which includes a distress. The railway is a public highway. [Lord Campbell C. J. May not the owner of the soil of the highway justify the removal of what is improperly there? *Wightman J.* Suppose cattle stray on a public road.] Cattle may no doubt be improperly on a public highway, as appears from *Dovaston v. Payne (a)*. Here the impropriety is merely a neglect, not of a common law duty, but of a statutable duty, for which the statute provides the remedy. [*Wightman J.* It provides a penalty for the infringement of the duty.] The provision does not seem to have in view the punishment of the party. [*Coleridge J.* There is a penalty which may be imposed with a view to the public safety. *Erle J.* The right of the plaintiffs to bring their engine on the railway at all was under a conditional legal power: the condition not being performed, they were trespassers; *Six Carpenters' Case (b)*.] The common law principle is inapplicable here: The Railways Clauses Consolidation Act, 1845, must be considered as the

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(a) 2 *H. Bl.* 527. See judgment of *Patteson J.* in *Fawcett v. York and North Midland Railway Company*, 16 *Q. B.* 610. 618.

(b) 8 *Rep.* 146 a.

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code for the user of the railway. [Lord *Campbell* C. J. You require express words to take away a common law right.] The common law authorizes a distress damage fessant, that is, a removal and detaining till amends are made: the statute here authorizes the removing only: that impliedly excludes so much of the common law right as goes beyond the mere removal.

On the demurrer to the plea to the new assignment to the third plea, the question is, Whether the defendants were justified in detaining the engine on the ground that the plaintiffs had the intention of using it illegally. [*Coleridge* J. Suppose the plaintiffs to say, Give us the engine in order that we may use it on your railway. Lord *Campbell* C. J. Suppose a man says, Give me a sword that I may stab *J. S.*] Those are suppositions of facts different from the facts set up by the plea.

Phipson, contra, was stopped by the Court.

LORD CAMPBELL C. J. The defendants are entitled to judgment on both points. As to the first: it cannot be doubted that the owners of the railway had a common law right to distrain the engine damage fessant. Then what is there to take away the right? I see nothing in sect. 116 but a cumulative right, namely, to remove and to recover a forfeiture. That remedy is quite consistent with the common law right. I do not say that both could be pursued: but the defendants clearly might resort to their common law remedy, though they had also a right to a cumulative remedy. As to the second point: at first I understood the plea as asserting merely that the plaintiffs intended to make an improper use of the engine: and, had that been all, I should have thought that the detainer was not justified. But the

plea shews that the plaintiffs demanded the engine "for the purpose and in order" that they might make an illegal use of it. Now the defendants were clearly not bound to restore the engine for an illegal purpose. The plea therefore is good.

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COLERIDGE J. I am of the same opinion. If sect. 116 had stopped at the pecuniary forfeiture, it would have been impossible for Mr. *Willes* to contend that the common law right of distress damage fasant was taken away. But he contends that, as the right of distress damage fasant comprehends two things, the removal and the detainer, and the statute expressly gives the right of removal, the right of detainer is taken away. But there appears to be good reason for the Legislature giving the one without intending to take away the other. It may well be that it was not intended that the owners of the railway, if they chose to enforce the forfeiture, should be allowed to detain the engine; and yet, for the public safety, it might be thought right that the engine should not be allowed to remain on the line: so that the right of removal is expressly preserved, even where the penalty is enforced, though the enforcement of the penalty may exclude the exercise of the right of distress, which comprehends both removal and detainer. As to the other point, if I make a demand for the purpose of doing an illegal act, the party on whom I make it is justified in refusing it: this is quite different from refusing upon the mere belief that there is an intention to do an illegal act after the demand is complied with.

WIGHTMAN J. As to the first point: there is nothing

1853. in sect. 116 taking away the common law right. There are, it is true, other consequences entailed, by the section, on the wrongful act: but these might be wholly insufficient to compensate for the damage done. On the other point I felt a difficulty, whether the demand could be held to be bad in consequence of the intention to do an unlawful act. But, on looking more carefully at the plea, it appears that the plaintiffs demanded the engine for the purpose of doing, and in order to do, an illegal act. It is not indeed said for the "express" purpose: but, in reasonable intendment, the plea must be understood as alleging that the demand was made with the very object. The provisions of sects. 115, 116, though for the benefit of the company, also concern the public very much.

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ERLE J. I also am of opinion that the common law remedy is not taken away, but that sect. 116 is cumulative. As to the other point: the defendants appear to have acted upon the statutable provision by removing the engine. I take the facts to be, that the plaintiffs said: Now your power is at an end; take your hands from the engine; we mean to use it unlawfully. The defendants answer: You shall not do so: either the engine shall remain off the line, or you must get a certificate of approval.

Judgment for defendants.

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The QUEEN against The Inhabitants of
LLANSAINTFRAID GLAN CONWAY.

Wednesday,
November 9th.

ON appeal against the after mentioned order of removal, the Sessions confirmed the order, subject to a case upon which the following facts appeared.

The order was for the removal of "*Mary*, the wife of *Thomas Roberts*," and "their four children," aged respectively seven years, four years, three years and six months, from the parish of *Aber* in *Carnarvonshire* to the parish of *Llansaintffraid Glan Conway* in *Denbighshire*. The order adjudicated "that the place of the last legal settlement of the said *Thomas Roberts*, his said wife *Mary*, and their said four children, is in the said parish *Llansaintffraid Glan Conway*."

The grounds of removal stated (among other things) the marriage of *Thomas* and *Mary Roberts*; and that at the time of the marriage, which took place about nine years ago, the said *Mary* was living in the parish of *Llansaintffraid Glan Conway* in a house which she rented, as tenant from year to year, at the yearly rent of 2*l.* 10*s.*; and she and her husband, after the marriage, continued to reside and sleep in the same house for a period of about nine months. That *Thomas Roberts* deserted his said wife and children about six months ago, while they were residing in the parish of *Aber*, in which parish they had ever since continued, and from which they were now in receipt of relief. That *Thomas Roberts* had not since returned to his wife and children, and could not now be found.

If a man, settled in a parish by estate, ceases to inhabit within ten miles, and so loses his settlement there, under sect. 68 of stat. 4 & 5 W. 4. c. 76., his wife and unemancipated children must follow his settlement. If he have none, or none known, they nevertheless cannot be removed to such parish.

So held, in a case where the man had deserted the wife and children, and could not be found.

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 The QUEEN on the facts now found, as follows, in the statement of
 v. the case.

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Upon the trial of the appeal, it was admitted that *Thomas Roberts*, the husband of the pauper *Mary Roberts*, gained a settlement in the appellant parish as stated in the grounds of removal. That, about nine months after the marriage, and before the birth of any of the children, the tenancy in the appellant parish ceased; and *Thomas Roberts* and his wife went to live at a distance of upwards of ten miles from that parish, and continued to reside beyond that distance therefrom for upwards of twelve months. And it was admitted that *Thomas Roberts* had lost his settlement in the appellant parish thereby.

The question for the opinion of the Court was stated to be: Whether the paupers were, under the circumstances, entitled to a derivative settlement in, and to be removed to, the appellant parish.

Hugh Hill and *Corner*, in support of the order of Sessions. The question is, whether the husband's loss of settlement destroyed the settlement of the wife and children. He was settled in *Llansaintffraid Glan Conway*, in respect of the estate which he acquired by his marrying a woman having an interest in land there. The wife's settlement, if the husband has no settlement of his own, is not suspended during the coverture; she may be removed to it; *Rex v. St. Botolph's* (a); where *Ryder C. J.* said: "This former settlement could not cease; but would continue during life, or till a new one

(a) *Burr. S. C.* 367.

should be gained: there is no case where a settlement ceases by any other method." Now the effect of sect. 68 of stat. 4 & 5 W. 4. c. 76. was to prevent the husband from retaining his settlement for any longer time than he inhabited within ten miles of *Llansaintffraid Glan Conway*: but it gave him no fresh settlement: the section enacts that a person so ceasing to inhabit may be removed to his previous settlement, or to any settlement acquired since his ceasing to inhabit. In this case it does not appear that *Thomas Roberts* ever had, before or since his residing at *Llansaintffraid Glan Conway*, any settlement: if he had, it was for the appellants to shew it. The wife and children have thus acquired no new settlement; and their settlement in the respondent parish continues. In *Rex v. Hendon* (a) it was held that by the loss of the father's settlement under stat. 4 & 5 W. 4. c. 76. s. 68. the child's settlement is not affected. [*Coleridge J.* There the child had been emancipated before the settlement of the father was lost.] That circumstance appears to be unimportant, according to the view taken by *Coleridge J.* [*Coleridge J.* It strikes me that, if I said so, I was wrong: but I did not mean to lay that down generally. I was answering the argument of counsel; and I meant to point out that an unemancipated child would lose his settlement, not by sect. 68, applying only to settlement by estate, but by the general law of his following his father's settlement: so that he would not be directly affected by the clauses any more than an emancipated child. In that sense, the remark seems correct.] There is not shewn, in this case, any new or old settlement of the husband for the wife and children

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(a) 2 Q. B. 455.

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to follow: they therefore retain the settlement which they had before the loss of his settlement; *Rex v. Harberton* (a), *Regina v. Yelvertoft* (b), *Regina v. Birmingham* (c). The settlement of a woman who marries a man without a settlement is only suspended, unless he obtain one. [Coleridge J. But here you are relying on the settlement gained through the husband's settlement.] The settlement is not the more liable to destruction for being derivative; *Regina v. Hendon* (d). [Coleridge J. What do you say would have been the effect of the husband acquiring a new settlement?] That would have wholly destroyed the previous settlement of the wife and children. This is the utmost effect that can be given to sect. 68. [Coleridge J. But in *Regina v. Hendon* (d) there was no such destruction. Erle J. Where the husband acquires no new settlement, and has none prior to that in the parish where the estate lies, must he, according to your interpretation of sect. 68, be removed back to that parish? If so, what is this but retaining his settlement?] In *Archbold's Poor Law*, 419 (7th ed.), it is shewn that, where the father has no settlement, or one not known, the children take the mother's settlement: what kind of settlement that is is immaterial. [Lord Campbell C. J. Is there any instance of a woman acquiring a settlement in her own right during coverture? Coleridge J. Properly speaking, a married woman does not become chargeable: her husband becomes chargeable in respect of her.]

Pashley and *T. O. Morgan*, contrà, were stopped by the Court.

(a) 13 *East*, 311.

(b) 6 Q. B. 801.

(c) 8 Q. B. 410.

(d) 2 Q. B. 455.

Lord CAMPBELL C. J. The order is clearly bad with respect to both the wife and children: neither had a settlement in the appellant parish. Stat. 4 & 5 W. 4. c. 76. s. 68. enacts that the settlement by possession of an estate shall determine when the owner of the estate shall cease to inhabit within ten miles. It is then as if the settlement had not existed: not indeed that it becomes void ab initio; for all that is completed under that settlement will still remain unaltered, as in the case of an emancipated child, who, if the emancipation takes place while the father retains the settlement, has gained a complete settlement independent of the father, and does not lose it on the father losing the settlement. But neither a wife nor an unemancipated child can acquire any settlement in their own right by virtue of the settlement of the husband and father. There was therefore no ground for removing the wife and children in the present case to the appellant parish, more than to any other parish.

COLERIDGE J. I am of the same opinion. The statute is very simple: and, in construing it, we must take it in connection with that which, when it passed, was the state of the law; for the intention was to preserve the law in all points except those altered by the statute. Where a man had a new or an old settlement, he was removable to that; and his wife and children were removable with him. This was done in his right, not as in respect to their own settlement. But here it is not found that the husband had any settlement at all: if he had, they could be removed to such settlement only. Assume that he has no settlement: what follows? They are attached to him, the coverture remaining, and

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the unemancipated children being properly with him. He cannot be removed; nor can they. All that *Regina v. Hendon* (a) decided was, that an emancipated child, who had, through the father's settlement, gained an independent settlement, could not lose it by the father losing his settlement: and for that Lord *Denman* gives a good reason, that the settlement to be put an end to by the statute must be one gained by the party who is to lose it. The refusal to extend the statute in that case is, in fact, in accordance with our present decision.

WIGHTMAN J. In this case the wife and children had no independent settlement of their own, and could therefore be removed only to the man's settlement. I feel a difficulty in entertaining any doubt.

ERLE J. The question is as to the effect of sect. 68 upon the unemancipated members of the man's family. Is their inchoate and contingent settlement extinguished by the loss of his? I think it is; and that they took no derivative settlement: and that the order of removal was therefore bad.

Order of Sessions quashed.

(a) 2 Q. B. 455.

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The QUEEN *against* The Inhabitants of
ST. MARY MAGDALEN, BERMONDSEY.

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ON appeal against an order of two justices, whereby *James Spinks* was removed from the parish of *St. George the Martyr, Southwark*, to the parish of *St. Mary Magdalen, Bermondsey*, both in *Surrey*, the Sessions confirmed the order, subject to a case which was, in substance, as follows.

On the hearing of the appeal, it was proved, by the respondent parish, that the pauper, *James Spinks*, gained a settlement by apprenticeship in the appellant parish,

By Rules of the Poor Law Commissioners under stat. 4 & 5 W. 4. c. 76. s. 15. and 7 & 8 Vict. c. 101. s. 12., respecting the binding of poor children apprentices, it was ordered: That no child should be bound who could not write his own name;

That no person above the age of fourteen should be bound without his consent; That no child under the age of sixteen should be bound without the consent of his father, or, if his father was dead, or disqualified (as after specified) to consent, or if the child should be a bastard, without the mother's consent, if living; and then disqualifications of the parent were specified; and, in the case of the mother being so disqualified, no consent was to be required; That the indenture should be executed in duplicate by the master and guardians (or person authorized to do so), and should not be valid unless signed by the apprentice without aid in the presence of the guardians, and the consent of the parent, where requisite, should be testified by the parent's signature or mark, and, where such consent was dispensed with (as above provided), the cause should be stated at the foot of the indenture; That any justice ordering or allowing the binding should certify, at the foot of the indenture, that he had ascertained that the rules had been complied with.

Held: 1. That these Rules, excepting that as to the signature by the apprentice, were directory only, and non-compliance with them did not make the indenture void.

2. That the apprentice's consent, though he be above the age of fourteen, need not appear on the face of the indenture otherwise than by his signing.

3. That the fact of such consent would be assumed in default of proof of non-consent, both from the ordinary presumption that all things were duly performed, and from that arising from the justice's certificate at the foot of the indenture.

4. That, in default of proof to the contrary, the execution of the indenture in duplicate would be assumed from the same presumptions.

5. That, no consent of the parents, or ground of dispensation, appearing on the indenture, it would be assumed that both were dead, and so no consent or dispensation requisite, from the same presumptions.

So held, on an appeal against a removal founded upon a settlement gained under the indenture.

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if the indenture of apprenticeship under which he served was valid in point of law, with reference to the objections hereinafter stated, and the grounds of appeal applicable thereto.

The indenture under which the said pauper served was dated 27th *October* 1851, and was made between the churchwardens and overseers of the poor of the parish of *Saint Mary, Newington*, in *Surrey*, of the first part, and *Henry John Lord*, a boot and shoemaker, of the second part; a copy of which indenture, together with the order for binding, allowances and certificates, subscribed to or endorsed thereon, was annexed to and was to be taken as part of the case.

The indenture was signed and sealed by *Lord*, by *Spinks*, and by the churchwardens and overseers. It witnessed that the churchwardens and overseers placed *Spinks*, "a poor child, of the age of fourteen years or thereabouts, who can read and write his own name," apprentice to *Lord* until *Spinks* should attain the age of twenty one.

The order was dated 27th *October* 1851, and was under the hand and seal of *George Percy Elliott Esq.*, therein described as one of the magistrates of The Police Courts of the Metropolis, sitting at the Police Court, *Lambeth*, within The Metropolitan Police District, and in the county of *Surrey*: and it ordered the binding, following the directions of stat. 56 G. 3. c. 139. s. 1. In the margin of the indenture was written the allowance, of the same date, also under the hand and seal of Mr. *Elliott*, described therein as before; following the same statute. At the foot of the indenture was a certificate, of the same date, signed by Mr. *Elliott*,

described therein as before: which certificate followed the form given in Article 29 of The Rules and Regulations hereinafter mentioned (besides certifying compliance with the General Order of the Commissioners of 22d *August* 1845; upon which nothing turned).

The poor of the parish of *Saint Mary, Newington*, are governed, provided for, employed and managed, and the board of guardians for that parish are appointed, under stat. 54 *G. 3. c. cxiii. (a)*.

Certain Rules of the Poor Law Commissioners, dated 29th *January* 1845, were given in evidence at the trial of the appeal by the appellants, and were proved to have been issued by the Commissioners, and sent by them to the churchwardens and overseers of *Saint Mary, Newington*, more than fourteen days before the making and execution of the indenture, and to be signed and sealed according to the statute in that case made and provided; a copy of which Rules was annexed to and formed part of this case. The Rules were addressed to the Guardians of the poor of the several Unions and Parishes named in the schedule thereunto annexed, the officers of such Unions and Parishes, the churchwardens and overseers of the several parishes and places comprised within the said unions, and of the several other parishes named in the schedule, and to the clerks to the justices of the Petty Sessions for the divisions in which the parishes and places were situate, and to all others whom it might concern. The material parts were the following.

(a) Local and personal, public: "For repealing an Act passed in the 48th year of the reign of His present Majesty, intituled *An Act for better assessing and collecting the poor and other rates in the parish of St. Mary, Newington, in the County of Surrey, and regulating the poor thereof*; and granting other powers in lieu thereof: for rebuilding or repairing the workhouse; and removing and preventing encroachments and annoyances in the said parish; and for other purposes relating thereto."

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"In pursuance of the powers vested in us by an Act passed" &c. (4 & 5 W. 4. c. 76. (a)), "and an Act passed" &c. (7 & 8 Vict. c. 101. (b)), "We, the Poor Law Commissioners, do make the following rules and regulations in regard to the apprenticing of poor children of the several unions named in the schedule A. hereunto annexed, and of the parishes named in the schedule B. hereunto annexed.

" The parties.

"Article 1. No child under the age of nine years shall be bound apprentice; and no child that cannot read and write his own name."

" Consent.

"Article 5. No person above fourteen years of age shall be so bound without his consent. And no child under the age of sixteen years shall be so bound without the consent of the father of such child, or, if the father be dead, or be disqualified to give such consent as hereinafter provided or if such child be a bastard, without the consent of the mother, if living, of such child. Provided that, where the parent of such child, whose consent would be otherwise requisite, is transported beyond the seas, or is in the custody of the law having been convicted of some felony, or for the space of six calendar months before the time of executing the indenture has deserted such child, or for such space of time has been in the service of Her Majesty or of *The East India Company* in foreign parts, such parent, if the father, shall be deemed to be disqualified as hereinbefore stated: and, if it be the mother, no such consent shall be required."

(a) See sect. 15.

(b) See sect. 12.

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“Article 15. The indenture shall be executed in duplicate by the master and the guardians, or the person lawfully authorized to do so, and shall not be valid unless signed by the proposed apprentice without aid or assistance, in the presence of the said guardians. And the consent of the parent, where requisite, shall be testified by such parent signing with his name or mark, to be properly attested, the foot of the said indenture: and, where such consent is dispensed with, under the provision contained in Article 5, the cause of such dispensation shall be stated at the foot of the indenture by any clerk or other officer acting as clerk to the said guardians.”

“Article 29. And, in pursuance of the provisions contained in the said first recited Act, We do direct that, whenever any justice or justices shall under any authority of law assent or consent, order or allow of, the binding of any poor child as apprentice, such justice or justices shall certify, at the foot of the indenture and the counterpart thereof, in the form and manner following, that is to say:

“I or we (as the case may be), justice or justices of the peace of and in the county (or other jurisdiction, as the case may be) of _____, who have assented to, ordered or allowed, the above binding, do hereby certify that we have examined and ascertained that the Rules, Orders and Regulations of the Poor Law Commissioners for the binding of poor children apprentices, and applicable to the above named parish (or other place as the case may be), contained in their general Order, bearing date the 29th day of *January* 1845, have been complied with.

“Signed this _____ day of _____ .

Signature.”

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Schedule B. comprehended the parish of *St. Mary, Newington*.

The grounds of appeal applicable to the present case were as follows.

“That the said indentures were and are illegal and void, because it does not appear, on the said indentures, that the said *James Spinks* consented to the said alleged binding, or that either of his parents consented thereto. That, in fact, no such consent was given. That the said indentures were and are illegal and void, because it does not appear, on the said indentures, the cause of the consent of the parents of the said *James Spinks* to the binding being dispensed with. That the said indentures were and are illegal and void, because they do not comply with the enactments, or contain the requisites, of the statutes now in force for the regulation of the binding of parish apprentices; and because they do not comply with the Regulations of the Poor Law Commissioners.”

No evidence was given, at the hearing of the appeal, except as appears from the indenture, and the allowance thereof by the police magistrate, and his certificate at the foot thereof, that the said indenture was executed in duplicate by the master and guardians, or the persons lawfully authorized to do so.

James Spinks was, at the time of the alleged binding, under the age of sixteen years, as appears by the said indenture.

No evidence was given, on the hearing of the appeal, otherwise than by production of the indenture, with the order for binding by the police magistrate, and his allowance, and certificate thereon, that, at the time of the making and execution of the said indenture, either

of the parents of *James Spinks* was dead, or that either was, at the time of the making and execution of the indenture, or ever had been, transported beyond the seas, or in the custody of the law having been convicted of felony; or that either of the said parents, for the space of six calendar months before the time of executing the indenture, had deserted *James Spinks*, or for such space of time had been in the service of Her Majesty or *The East India Company* in foreign parts. Nor was any evidence given that the parents of the pauper, or either of them, were or was alive at the time of the binding. Nor was any evidence given by the appellants that such binding was without the consent of the pauper, or that the indenture was not executed in duplicate: but evidence was given by the pauper that, before being bound, he went to his master for a month, on liking, and was afterwards, and before the binding, examined by the magistrate who made the order for the binding and allowed the indenture.

It was contended, on the part of the appellants, that the pauper gained no settlement by service under the indenture, because the indenture was illegal and void, inasmuch as it did not appear that the indenture was executed in duplicate by the master and guardians, or the persons lawfully authorized to do so, as is required by Article 15 of the said Rules; and inasmuch as it did not appear, by the said indenture, that *James Spinks* consented to the alleged binding, or that either of his parents consented thereto, as required by Article 5 of the said Rules; and inasmuch as, if the consent of the parent were dispensed with under the said provision contained in Article 5 of the said Rules, the cause of such dispensation was not stated at the foot of the

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indenture, as required by Article 15 of the Rules, or in any manner whatever.

The Sessions overruled the objections, and confirmed the order of removal, subject nevertheless to the opinion of the Court of Queen's Bench.

The question for the opinion of this Court is, Whether, having regard to the grounds of appeal, the indenture of apprenticeship be illegal and void on the grounds above alleged. If the Court shall be of opinion, upon the above objections, having regard &c., that the indenture is illegal and void, then the order of Sessions and the order of removal are to be quashed. But, if the Court shall be of opinion that the indenture is valid, then the order of Sessions to be confirmed.

Locke and Corner, in support of the order of Sessions. It may perhaps be questioned whether the Commissioners had power to make these rules, if the non-compliance is to have the effect of avoiding the indenture when particular words are not inserted. [*Coleridge J.* Sect. 105 of stat. 4 & 5 *W. 4. c. 76.* and the following sections clearly assume that the orders of the Commissioners are to be in force unless removed hither by certiorari; for it is provided that, unless declared illegal upon such removal, they shall be in force as if they had not been removed.] The power would be a very large one; and this is the more striking, because the respondent parish has no notice of the rules, but only the binding parish. [*Lord Campbell C. J.* It would be strange if the Legislature intended that, where the binding parish consented to the Rules, a third party should question their effect on the binding.] From the Legislature having passed stat. 7 & 8 *Vict. c. 101. s. 12.*, it seems that stat. 4 & 5

W. 4. c. 76. s. 15. was considered not to authorize the regulation of the terms of the indentures without further enactment: and sect. 12 of stat. 1 & 2 *Vict. c. 101. s. 12.* applies only to parishes included in a union or subject to a board of guardians under the general poor law: but the parish of *St. Mary, Newington* is governed by guardians under the local Act of 54 *G. 3. c. cxiii.*; and there may be doubt whether such guardians are within the Act. Further, Article 15 of the Rules expressly declares that the indenture "shall not be valid unless signed by the proposed apprentice:" this indenture is so signed: but no invalidity is created in case of non-compliance with the particulars which are the subject of the objection in this case: these particulars therefore must be considered as merely directory. One objection is that the indenture was not shewn to have been executed in duplicate, as directed by Article 15. That, at the most, would make the indenture voidable, not void; *Rex v. Fleet (a)*, where the master had not executed the indenture, as directed by stat. 8 & 9 *W. 3. c. 30. s. 5.* The non-compliance with the Rules of the Commissioners cannot have a greater effect than the disobedience to a statute. In *Rex v. St. Nicholas in Ipswich (b)* it was held that an indenture of apprenticeship, binding for four years only, was only voidable, contrary to the apparently express language of stat. 5 *Eliz. c. 4. ss. 26, 41.* Lord *Hardwicke* there laid much stress on the circumstance that the indenture had "had its effect between the parties:" and here the apprentice has served. In *Regina v. Fordham (c)* it was held that the words "shall be of no force or validity," in sect. 2 of stat. 6 & 7

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(a) *Cald. 31.*(b) *Burr. S. C. 91.*(c) 11 *A. & E. 73.*

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W. 4. c. 96., as to parochial rates, were confined, in their application, to the case of the want of signature by the parish officers. [Lord *Campbell* C. J. If you succeed in shewing that the Rule is only directory, you need not admit that the indenture is even voidable. *Coleridge* J. In *Rex v. Stoke Damerel (a)*, which was decided on stat. 56 G. 3. c. 139. s. 11., an enactment not having settlements primarily in view, you will find, I think, that all the Judges held the indenture void ab initio for not being conformable to the enactment.] There the enactment was that no indenture, wanting the prescribed requisites, "shall be valid and effectual." But, further, it does not here appear that there was no duplicate. [Lord *Campbell* C. J. Article 15 does not require that the fact of there being a duplicate should be expressed upon the indenture: and it would be monstrous to say that this is necessary.] Again, the grounds of appeal point out particular alleged deviations from the Rules, but not the one now in question: it is therefore not competent to the appellants to insist upon it under the general allegation of non-compliance with the Rules; *Regina v. Birmingham (b)*, *Regina v. St. Mary in Bungay (c)*. The next objection is that the consent of the apprentice or of his parents does not appear, by the indenture or by evidence, to have been given. As to the apprentice, it does not appear that he was above fourteen years old, which is the only case in which his consent is made necessary. If his consent were necessary, the Rules do not prescribe that the indenture shall shew such consent, unless that is the effect of Article 15, which requires signature

(a) 7 B. & C. 563.

(b) 8 Q. B. 410.

(c) 12 Q. B. 38.

by the apprentice. But that requisite is satisfied; for the apprentice has signed. [*Coleridge J.* It may be that his signature is required because it is required that he should be able to sign his name.] That seems very probable. As to the consent of the parents, it does not appear that either parent is alive: unless the father or mother was alive, dispensation is not required, and its cause need not be stated in the indenture. The apprentice may be a foundling. It is for the party objecting to shew the facts raising the objection: till they be shewn, the Court will presume the magistrate to have acted properly: and his certificate, at the foot of the indenture, that he has ascertained that the Rules have been complied with, is, to say the least, evidence of such compliance till the contrary is shewn.

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Knapp and Clerk, contra. First, as to the execution in duplicate. It was for the removing parish to shew that all had been done requisite for authorizing the removal: and one such requisite is the execution in duplicate. As to the consent of the parents, the only answer suggested to the objection is that the parents may be dead. But the deaths are distinct facts, which ought to be proved by the party relying upon them. [*Lord Campbell C. J.* I am very much impressed by the argument that we must presume the magistrate to have acted rightly.] That presumption, if applied here, would in effect dispense with the compliance with almost all the regulations. [*Lord Campbell C. J.* It would not go so far as that.] If that meets the objection as to the parents, it will probably be held to meet the objection as to the consent of the apprentice. [*Lord Campbell C. J.* Besides, we have the apprentice's signature: you would

1853. scarcely call upon us to presume duress.] The Commissioners clearly considered that the consent and the signature of the apprentice were two distinct requisites.

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LORD CAMPBELL C. J. I am sure that this case has been very well argued: but I come to the conclusion that the order is good. For, in the first place, we are not to presume that a regulation published by the Poor Law Commissioners has been violated. As to the facts of consent and of the execution in duplicate, it seems to me that they need not appear on the face of the indenture: and we must presume, from the magistrate's certificate, that these requisites were complied with in fact. Had they not been complied with, I should still have been prepared to say that they were directory only, and that the failure to comply with them did not make the binding void. The Rules do give this effect of avoidance in the case of one regulation, namely, that for the signature of the apprentice: but, as to the other provisions, the validity does not depend upon the strict pursuance of any form.

COLERIDGE J. I am of the same opinion. I think we must suppose the Poor Law Commissioners to have expressed what provisions those are, the non-pursuance of which is to invalidate the indenture: they do say this as to one provision; they do not repeat it as to the others: and, as to a great many of these, it is quite clear, from their nature, that they are only directory, and could not possibly be supposed to affect the validity of the indenture. Then the magistrate orders and allows this indenture under one statute, and under another certifies that the Rules of the Commissioners have been

complied with. Surely this aids the ordinary presumption which exists, that all is rightly done when the contrary does not appear. I admit that, if you shew a condition which can be satisfied only by something appearing on the face of the instrument, no presumption will aid the absence of this. But in the present case the necessity for the consent of the parents exists only when parents are alive; and it is in that case only that the provision as to dispensation, and as to the ground of dispensation appearing in the indenture, applies. And, as to the consent of an apprentice, it is not said that this must appear on the face of the indenture, but only that he must sign without aid; the object probably being to secure a fulfilment of the requisite, which we find earlier, that he should be able to write.

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WIGHTMAN J. There is nothing on the face of the indentures to shew that the Rules of the Commissioners have not been complied with. I think, in the first place, that the Rules are, with a single exception, only directory; and, in the second place, that the certificate raises the presumption that they have been complied with in fact.

ERLE J. I agree also in the presumption of fact, and in holding the regulations in question to be only directory. It is clear to my mind that great mischief has been done where parties, having acted on an instrument as valid, find their intention defeated by the neglect of some regulation relating to the instrument. It is best to hold such regulations to be directory only, except where the Legislature has expressly said that the non-compliance shall make the instrument void.

Order of Sessions confirmed.

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Wednesday,
November 9th.

WESTOBY *against* DAY.

FOR the certificate of the custom of the city of *London* in this case, see *ante*, p. 628.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Tuesday,
November 10th.

RICHARD GILES *against* The TAFF VALE
Railway Company.

Trover, for
quicks and
plants, against
a Railway
Company.

ERROR on a bill of exceptions tendered by the
defendants.

Trover for quicks and plants.

Plea: Not

guilty. On the trial, the Judge ruled that there was sufficient evidence of a conversion by defendants. To this ruling defendants excepted. Verdict for plaintiffs. The bill of exceptions set forth the whole evidence. By this it appeared that plaintiff was a contractor planting hedges for defendants at one of their stations, and was owner of live thorn plants which had been, by leave of *F.*, who was called in the bill of exceptions the general superintendent of the Company, placed in a piece of ground belonging to defendants and close to the station. Plaintiff demanded these thorns from the station master, and was referred to *F.*; and *F.*, professing to act for defendants, refused to let the plaintiff remove them. It did not appear, distinctly, when or under what circumstances the thorns were brought to the station. The majority of the Judges in the Court of Exchequer Chamber (*Jervis C. J.*, *Pollock C. B.*, *Alderson B.*, *Mauel J.*, *Platt B.*, *Williams J.*, and *Talfourd J.*) construed the bill of exceptions as meaning that the thorns had been carried as merchandize on the line, and left in the ground of the defendants with their roots covered as a mode of warehousing them for a reasonable time in such a manner that they might remain alive. *Parke B.* construed the bill of exceptions as, at most, shewing evidence that the thorns had once been carried on the line, and had afterwards been left in defendants' ground for an indefinite time, for the convenience of the plaintiff as contractor, and not as an incident to the carriage. *Martin B.* doubting whether, on the true construction, the relation of carrier and customer ever existed at all with respect to these thorns.

Held by all the Judges: that it is the duty of a company, carrying on trade, to have on the spot an officer with authority to do for the company all that, in the ordinary exigencies of their business, might require to be done promptly: that, in this respect, there

Plea: Not guilty. Issue thereon. (It is not necessary to notice the other pleadings.) Verdict for plaintiff.

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Judgment having passed in the Queen's Bench for the plaintiff, error was suggested by the defendant. A bill of exceptions tendered by the defendant, at the trial before *Wightman J.* at the *Glamorganshire* Spring Assizes, was tacked to the record. The bill of exceptions set forth that, at the trial, "the plaintiff proved that he, plaintiff, was, in 1851, a sub-contractor under one *Jones*; that he received in part payment from *Jones* 90,000 quicks; that they were worth the sum of 41*l.*; that they were the remainder of some he had bought; that they were planted at the *Aberaman* Station, to keep them alive. That, early in 1851, he, plaintiff, sold 1400 of the same quicks; that he took them away; that no objection was made to his taking them; that plaintiff went to take away the remainder in the course of the following season; that the clerk of the station would not let plaintiff take them away without the order of *Fisher*, the general superintendant of *The Taff Vale Railway Company*; that plaintiff applied to *Fisher* repeatedly; and that *Fisher* would not let plaintiff have

is no difference between an ordinary partnership and a corporation: that there was sufficient evidence that *F.* had authority to this extent from the defendants, and that it was not necessary to shew any authority under seal. Held also, by all the Judges, that to give up, or refuse to give up, on demand, goods left with the defendants in the course of their trade as carriers, was an act within the scope of such authority; and that, on

the construction put on the bill of exceptions by the majority of the Judges, these thorns were so left, and therefore there was evidence of a conversion by defendants.

Parke B. was of opinion that the implied authority of such an officer is strictly confined to acts within the scope of the Company's ordinary business, and that there was no evidence that *F.* had a more extensive power: that goods warehoused for a short time, as a custody ancillary to their carriage, would have been in the possession of the Company in the course of their ordinary trade; and to refuse to deliver those was within the scope of *F.*'s authority: but that it was beyond the *prima facie* authority of *F.* to allow the thorns to be planted for an indefinite time for plaintiff's convenience. *Parke B.* therefore doubted whether a refusal to deliver up goods so left was within the scope of *F.*'s authority, or would make defendants liable: and therefore he did not concur in holding the direction right, not being satisfied that evidence had been given upon which a jury could find for defendants.

Per *Maule J.* The goods having been once in defendants' possession, it lay within the scope of *F.*'s authority to deliver them up, whether, in allowing them to be planted, he exceeded his power or not. And, further, that it was not beyond the *prima facie* power of *F.* to grant any reasonable accommodation to customers; and to allow plaintiff to store his quicks in their Company's ground till wanted was not *prima facie* an unreasonable accommodation.

Judgment affirmed.

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them ; that plaintiff offered to sell the said quicks ; and that *Fisher* refused : that plaintiff had other quicks at the *Navigation* Station, 120,000, which the plaintiff had paid for, and for the carriage, and that *Fisher* had given plaintiff leave to plant them in a piece of ground of the Company's there, to keep them alive ; and that plaintiff sold some of them to Mr. *Phillips* ; that plaintiff applied to *Fisher* for leave to remove them ; and that *Fisher* said they were not the property of plaintiff, and claimed them for *The Taff Vale Railway Company*, and refused to allow plaintiff to remove them ; that plaintiff went to Mr. *Bushell*, who is managing director of *The Taff Vale Railway Company*, and he would not let plaintiff take them away : that *Fisher* said plaintiff should not remove the quicks unless plaintiff would give to him, *Fisher*, an indemnification for those which the Company had used at the *Aberaman* Station ; that *Fisher* said to plaintiff, " You must give me a receipt as if you had been paid for them : " that plaintiff had worked for *The Aberdare Company* ; that they were fencing with quicks, but not by contract in writing ; that the sale by *Jones* to plaintiff was of quicks at *Aberaman*, which *Jones* had got from *Ireland* : that plaintiff received a letter from the Company in consequence of an application for these quicks ; that the quicks at *Aberaman* were not the refuse, but the overplus : that plaintiff was about three weeks or a month fencing for *The Aberdare Company* : that it was in 1850 that the conversation with *Jones* occurred ; and, further, that *Jones* in the year 1850 contracted to fence the *Aberdare* railway with quicks : that the plaintiff was employed under *Jones* ; that the quicks belonged to *Jones* ; that some of them remained unused : that *Jones* sold them to plaintiff in part payment of what the

plaintiff had done ; that *Fisher* had never bought them of *Jones* ; that *Fisher* was general superintendant of *The Taff Vale Railway* ; that Mr. *Bailey* was to inspect and was to be satisfied with the fencing ; that it was not *Fisher* who was to be satisfied ; that *Jones* was obliged to pay for quicks carried along the line ; that *Jones* paid 85*l.* for carrying 300*l.* worth of quicks ; that *Jones* was engineer of *The Aberdare Company* from 1845 to 1847 ; that *Jones's* fencing was inspected by Captain *Lewis* and Mr. *Bailey* before *Jones* was paid : that *Jones* was afterwards paid for the fencing ; that the quicks on the *Navigation Station* were worth 10*s.* per 1000 ; and further that *John Williams*, the clerk to the plaintiff's attorney, saw *Fisher*, who said that he had refused to give up the *Navigation* quicks because *Giles* had not settled for the quicks at *Aberaman Station* ; that *Fisher* said : ' I believe those quicks at *Aberaman* are the property of the Company : ' that he said : ' I have no doubt that the quicks at the *Navigation Station* are the property of the plaintiff ; and I believe the Company will pay the value of them into Court : ' that this was about a fortnight before the trial ; that he said some of the *Aberaman* quicks were removed and sold by his, *Fisher's*, orders, and that *The Taff Vale Railway Company* had had the money." The bill of exceptions, without setting out anything more, or further explanation, then stated the contention of the counsel of the plaintiff that this was sufficient evidence, if unexplained, to justify a verdict on the plea of Not guilty against the defendants ; and of the counsel for the defendants, that there was no sufficient evidence ; and the direction of the Judge that there was sufficient evidence : on which the defendants excepted. Verdict for plaintiff.

The case was now argued.

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H. Giffard, in support of the suggestion of error. There is upon the face of this bill of exceptions ample evidence of a conversion by *Fisher*; but there is no legitimate evidence that he was authorized to act for the defendants so as to make them responsible for his act. The defendants are a body corporate: but it must be admitted that the modern decisions establish that it is not necessary for the plaintiff to shew an authority under seal given to *Fisher* to convert those goods. Still the mere fact of his being a servant of the Company proves nothing, unless the act complained of was within the scope of his authority, or ratified by defendants; *Eastern Counties Railway Company v. Broom (a)*. Here *Fisher* is called "the general superintendant of *The Taff Vale Railway Company*;" but there is nothing to shew what authority is included in that term. The evidence set out seems rather weaker than that in *Eastern Counties Railway Company v. Broom (a)*, or that in *Glover v. London and North Western Railway Company (b)*. Nor does the interposition of Mr. *Bushell* carry the case further. He is called "managing director;" but a single director has no power to bind the Company; and what "managing director" means is not explained.

Evans, contra. The plaintiff is clearly entitled to his goods, which have got into the possession of the Company: what more could he possibly do, to get them, than he has done? [*Parke B.* The plaintiff must give evidence making out a case against the defendants. Have you done so? *Jervis C. J.* All persons, from first to last, appear to treat the superintendant, and the manag-

(a) 6 *Exch.* 314.(b) 5 *Exch.* 66.

ing director, as the proper persons to whom application was to be made about goods on the premises of the Company. Is not the question, whether that is sufficient evidence of their authority, or whether the plaintiff ought to have defined it? *Parke B.* If it had appeared that those goods were in the custody of the Company in the course of their ordinary business as carriers, I think it might perhaps be intended that the superintendant was a person having authority to superintend the ordinary traffic of the Company; and so his refusal to deliver goods in their possession would be enough to render the Company liable. But it seems that they were not in the custody of the Company as carriers. *Platt B.* But the parcel of quicks at the *Navigation Station* do seem to have been brought to that station by the Company as carriers. It is said, of those: "which the plaintiff had paid for, and for the carriage." That must mean, paid for the carriage to the Company, or it is quite an idle statement. Now, if that be the fact, it seems very material. *Martin B.* Even if the quicks once were in possession of the Company as carriers, they do not seem to have remained so. They are planted in the ground. Now the Company are carriers; but they are not nursery gardeners.] There was, at least, evidence that the second parcel were in the custody of the Company as carriers, and that the Company's agent refused to deliver them up. In *Glover v. London and North Western Railway Company* (a) the conversion was by a contractor who was not the servant of the Company. Here it is by *Fisher*, who is the servant of the Company. He is called "The general superintendant:" was it not competent to a jury to say what a general superintendant

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is? [*Maule J.* I should say that "general superintendant" meant an officer on the spot, having authority from the Company to do all which it may be necessary or convenient, for the management of their ordinary business, to have done without the delay which would be required for consulting the Company. A railway Company are carriers who carry a great variety of articles requiring different kinds of care: wild animals, for instance, if carried, may require to be secured in a cage; and there ought to be a person on the spot having authority to decide in what way they should be secured; and, if he were negligent, and in consequence a passenger received damage, I should say the Company would be responsible for it. And, in the same way, if the Company are carriers of live animals, the superintendant must decide whether the Company will give them food and water; or, if they carry living plants, whether they will cover the roots so as to keep them alive. And, incidentally to the business of a carrier, it may be very convenient to accommodate the persons whose goods have been carried, by keeping the goods for a time. The superintendant must decide, upon the spot, whether he will accommodate a customer, whose goods he has carried, by putting them in the Company's warehouses for a time; or, if they are horses, by putting them in the stable till it is convenient to take them away; or, if they are quicks, by covering their roots in the Company's ground so that they may not die before they are removed; or whether he shall refuse the accommodation at the risk of driving the customers elsewhere. In these days of extreme competition he will generally grant reasonable accommodation; and, if he does, he does not exceed his authority.]

H. Giffard, in reply. The thorns may once have been in the custody of the Company as carriers; but they have been delivered to the plaintiff, and by him re-delivered to *Fisher*, who in planting them in the Company's ground acted without authority.

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JERVIS C. J. I am of opinion that the judgment must be affirmed, as there was sufficient evidence to leave to the jury of a conversion by the defendants of part, at least, of those goods; and consequently the ruling excepted to was right; and there can be no *venire de novo* awarded. It is not necessary to consider whether there is any distinction between the parcel of quicks at the *Aberaman* Station, and those at the *Navigation* Station; for, if there was evidence of a conversion by the defendants of either, the direction was right. I shall therefore only consider the evidence referring to the parcel of 120,000 quicks left at the *Navigation* Station. I agree that the plaintiff must affirmatively prove his case by evidence reasonably preponderating in his favour: and the question is, whether there is such evidence of a conversion here.

It seems agreed by us all that, if those goods were carried by the defendants, and left with them in the ordinary course of their business as carriers, the demand and refusal from the superintendant on the spot would be sufficient evidence in support of this action against the Company. But it is said that, because the goods were not in the custody of the Company in the ordinary course, there was not sufficient evidence of *Fisher's* authority. I am of opinion that it is the duty of the Company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the

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Company with all cases arising in the course of their traffic as the exigency of the case may demand: and I think it was a question for the jury, whether *Fisher* in this case was a person having such authority. If he was, I think he had authority, in the exigency of the traffic, to keep the quicks in the mode in which they were kept, and that consequently they were in the custody of the Company in the course of their ordinary business. I am therefore of opinion that it was a case for the jury, and that there should be no venire de novo.

POLLOCK C. B. I agree with all that the Chief Justice has said, except that I do not think that it was necessary for the plaintiff to make out his case by evidence reasonably preponderating. I think the rule is that, if there is any evidence at all, the case must go to the jury, subject to the controul of the Court by granting a new trial if the verdict be against evidence.

I cannot distinguish between the case of a railway company, and any unincorporated partnership carrying on an equally extensive business. In trover for goods which are in the custody of an unincorporated company, it is not necessary to shew a demand of the goods from a partner, and a refusal by him. It is enough to shew a demand from, and a refusal by, the person allowed by the partnership to manage their business on the spot. I agree that it is the duty of a partnership to have a person on the spot with the authority necessary for managing the ordinary business of the concern: and that it was a question for the jury whether *Fisher* was there with such authority. I conclude he was. And I think it also a question for the jury whether these plants were put in the ground in the course of the business of the Company.

Some goods must be put in one sort of warehouse, and some in another; and there is nothing unreasonable in a carrier putting in the ground plants which might require such a step to keep them alive.

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PARKE B. I agree with a great part of what has been said: but I cannot agree, on the whole, that there was evidence to go to the jury: that is, evidence from which the jury might reasonably infer such a state of facts as would support a verdict for the plaintiff. Nothing turns upon the distinction between the two parcels at the two stations; for I agree that, if there is sufficient evidence of a conversion of either, the direction was right. And I agree that there was sufficient evidence that *Fisher*, and *Bushell* also, had sufficient authority to bind the Company in all matters within the course of their ordinary business. But I think that, if you seek to bind a company by the act of a person in something beyond the course of their ordinary business, you are called upon to give evidence of his authority to do that act: you must in that case shew something more than that he was acting as superintendant. I agree that the refusal to give up goods left in the custody of the Company in their ordinary course of business would be an act within the authority of the superintendant; but then comes the point on which I cannot at present agree. I do not dissent; for I should require more time for consideration before I dissented from the opinions of those who have preceded me, and of those who I know are to follow me: but I entertain a doubt too strong to permit me to agree. What I doubt is, whether the facts are such as to bring the goods in this case within the description of goods left with the Company within the scope of their

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ordinary business. If the goods had been carried by the Company, and left there for a short and reasonable time afterwards, that, I think, would have been a custody within the scope of their ordinary business. But the case is wholly silent as to the length of time; and my doubt is, whether *Fisher*, placing live plants in the ground of the Company and leaving them there for an indefinite time, can be keeping them for the Company as carriers. The same observation applies to the superintendant and the managing director: either had power to manage all the business of the Company as carriers: there is no evidence that either had greater authority. It struck me that *Fisher's* conduct was more like that of a person authorizing the contractor to leave his tools on the Company's premises, than that of a person acting for them as carriers. My impression is that it is no part of a carrier's trade to allow live plants to be kept planted in their garden for an indefinite time.

ALDERSON B. I think that there is evidence here that the second parcel, at least, had been carried upon the railway for the plaintiff, and that *Fisher*, the general superintendant, gave permission to the plaintiff to leave them at the station; and, till the plaintiff took them away, *Fisher* put them in the ground at the station. I think that was no more than keeping them in such manner that they may be alive when taken away. I think it was the duty of the superintendant, as such, to see that they were so kept alive; and of course, if it was his duty, it was within his authority.

MAULE J. I agree with my Lord Chief Justice. The only doubt suggested is with respect to the way in

which these quicks were kept, being planted in the ground; and whether that act was within the scope of the authority of the general superintendant. Now that question does not, I think, arise. This action is not upon a contract to plant these quicks. The Company are in possession of them as carriers; and, as an incident to keeping them, they are put in the ground, so as to prevent them from dying. Now, whether *Fisher* had or had not authority from the Company to do so, still they remained in the custody of the Company. If this action had been for putting these quicks in the ground in a negligent manner, the question would have arisen; but I think that, supposing *Fisher* to have planted them without the leave of the Company, still the plaintiff is entitled to have his goods from the Company, on demanding them from *Fisher*.

But I think it very clear that what was done was within the general scope of *Fisher's* authority. It is evident that this is a bulky article, and that the cost of the carriage bears a high proportion to the value of the article; for it is stated that 85*l.* was paid for the carriage of 300*l.* worth. And it is an article that cannot be kept alive without putting the roots in the ground. It was therefore proper that the quicks should be planted; and, to avoid the expense of carriage which the case shews to be so heavy, it was convenient that they should be planted near the station. I think that, under such circumstances, it was a proper exercise of his power, if the superintendant thought it fit, to grant such accommodation. Then there ought to be some one with authority from the Company to deliver up or refuse to deliver up goods. To whom was the plaintiff to apply, except to the station

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PLATT B. On this case I think the goods must have been in the custody of the Railway Company as carriers; for, on any other supposition, the statement that the plaintiff had paid the carriage would be wholly irrelevant. And then there is a demand and refusal, which is sufficient evidence of a conversion, if there was evidence of authority in the person refusing. But he is only called "the general superintendant of *The Taff Vale Railway Company*;" and it is objected that we do not know what a general superintendant is. But might not the jury know? Might not they rightly infer that he was a person having authority generally to superintend the affairs of the Company on the spot, and, in the course of such superintending, to deliver or refuse to deliver goods left with them as carriers? And then we have the conduct of the parties; the plaintiff, when he wants his goods, goes to the persons acting for the Company; and they all refer him to *Fisher* as the superior authority. I think that is sufficient evidence to go to the jury. Suppose an action were brought against a banker for dishonouring a cheque. If it were shewn that the cheque was dishonoured by a person standing behind the counter, and acting as clerk, and so treated by the others, I think that would be sufficient evidence that he was placed there by the banker as clerk, and that the banker was responsible for his acts. As to the planting of these quicks in the Company's ground: I think, under the circumstances, it was but another mode of warehousing articles of this nature, which unless

something of the sort was done would perish. I should agree with my Brother *Parke* that the case was too ambiguous to justify a judgment if this was a special verdict. But it is not a special verdict; and, if there was any evidence, however ambiguous, it was for the jury to solve the ambiguity.

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WILLIAMS J. I agree that there is evidence, though by no means conclusive evidence, that what *Fisher* did was done as servant of the defendants and by their authority.

TALFOURD J. I think there is evidence that the goods were on the premises of the Company with the knowledge of those who see and know for the Company, and that their general superintendant refused to deliver them up. I think that evidence sufficient to leave to the jury.

MARTIN B. I wish the bill of exceptions had been framed less ambiguously. If I thought, as the majority of this Court do, that the plaintiff and defendants were in the relation of customer and carrier as to these goods, I should have no doubt there was evidence. I own I think, on reading this case, that the facts are that the quicks were never brought as goods to be carried on the railway at all, but that the subcontractor had them there because it was a part of his contract to plant quicks; and that he left them there as he might have done his tools: and, if such were the facts, I do not see any evidence of authority on *Fisher's* part. But, taking the facts to be as the majority take them, I think there

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was ample evidence of authority. In *Scothorn v. South Staffordshire Railway Company* (a) the Court of Exchequer went a great deal further than is required in this case; for there it was in effect held that *The South Staffordshire Railway Company*, by receiving goods deliverable beyond *The London and North Western Railway*, constituted the station clerks of *The London and North Western Railway Company* their agents for all purposes of forwarding the goods.

Judgment affirmed.

(a) 8 Exch. 341.

Friday,
November 11th.

STAMATY COVAS Appellant against JOHN BINGHAM and WILLIAM BINGHAM Respondents.

A written contract was made for the purchase of "the cargo" of the *P.* "now at

A PPEAL from the county court of *Lancashire* holden at *Liverpool*, in the matter of a plaint of *Bingham v. Covas*.

Queenstown, as it stands, consisting of about 1300 quarters *Ibraila* Indian corn, at the price of 30s. per impl. quarter," cost, freight and insurance to a safe port in the U. K., "the quantity to be taken from the bill of lading, and measure calculated at 220 qrs. = 100 kilos. Payment cash, on handing shipping documents." The bill of lading expressed that, at *Ibraila*, were shipped in good condition on board the *P.*, bound to *Queenstown* for orders, 758 kilos. deliverable to Z. or assigns, he or they paying freight according to charterparty. "Quantity and quality unknown to" the master. A few days after the making of the contract, the shipping documents, including this bill of lading, were sent in by the vendor, with an invoice debiting the purchaser with the price of the number of quarters in 758 kilos. (at the rate of 100 kilos. = 220 qrs.) at 30s. per quarter, and crediting him with freight on the same number of quarters at 10s. 3d. The purchaser paid the balance, and ordered the *P.* to *D.*, where she delivered her cargo. On the delivery, the actual number of quarters proved to be less than that calculated from the bill of lading. The purchaser paid freight on the actual quantity only, at 10s. 3d. per quarter; and claimed to recover back from the vendor 19s. 9d. per quarter for the short delivery, as an overpayment.

Held: that the construction of the contract was, that the parties agreed to buy and sell the cargo at a price to be calculated from the quantity stated in the bill of lading, and not to depend upon the actual quantity; and that the purchaser took the chance of the actual quantity turning out more, or the risk of its turning out less, than the stated quantity; and consequently that he could not recover for short delivery.

The plaint was for money had and received, to recover 50*l.* for short delivery of corn, the plaintiffs having remitted the surplus above that sum. A case was stated, of which the material parts were as follows. That a contract between the parties to this action was made by a broker in *Liverpool*, on 16th *November* 1852. The note delivered to the plaintiffs was as follows :

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“ Messrs. *John Bingham & Co.*

“ I have this day sold to you, for account of Mr. *Stamaty Covas*, the cargo per *Prima Donna* 1st class *British* vessel from *Ibraila* now at *Queen's Town*, as it stands, consisting of about (1300) thirteen hundred quarters *Ibraila* Indian corn, at the price of (30*s.*) thirty shillings per impl. quarter, free on board, including freight and insurance to a safe port in the United Kingdom. The quantity to be taken from the bill of lading and measure calculated at 220 qrs. = 100 kilos. (11

Payment cash, on handing shipping documents and policy of insurance, less two months' interest from date.”

The plaintiffs, described as *John Bingham & Co.*, were the purchasers ; and the defendant was the seller. At the time this contract was made, the ship was at *Queen's Town*, waiting for orders. On 19th *November*, the bill of lading and a policy of insurance on the cargo, which were not in *Liverpool* when the contract was made, were received in *Liverpool* : and on that day the defendant sent in to the plaintiffs an invoice for the corn ; of which the following is a copy.

“ *Liverpool* 16th *Nov.* 1852.

“ Messrs. *John Bingham & Co.*

“ Bought of *Stamaty Covas*, payment cash, on handing documents, less 2 months' interest from date. The

1853.	cargo of <i>Ibraila</i> Indian corn per <i>Prima Donna</i> 1667½	
COVAS	quarters Indian corn @ 30/ p. Qr. . .	£2501 8 0
v.	less freight @ 10/3 . . .	£854 12 10
BINGHAM.		<hr/> £1646 15 2

“19th November. Documents now ready.”

On 22d November, the plaintiffs paid to the defendant 1646*l.* 15*s.* 2*d.*, less 11*l.* 19*s.* 2*d.*, interest, making the net payment 1634*l.* 16*s.* 0*d.*, and received from defendant the bill of lading, copy charter, and policy of insurance. The bill of lading was set out in the case. The material parts were “Shipped” &c. “by *Carrilli Petrocochino & Co.*, of *Ibraila*,” in the *Prima Donna*, “whereof is master” &c. “*Thomas Consitt*,” then at *Ibraila*, “bound for *Queen’s Town* or *Falmouth* for orders, seven hundred and fifty eight kilos. *Ibraila* measurement of Indian corn; *Wallachia* produce, dry sifted, of good quality and perfect conditioned, to be delivered unto order of Messrs. *Zizinia, Brothers*, of *London*, or to their assigns, he or they paying freight for the said goods as per charter party made in *London* the 10th March 1852,” “quantity and quality unknown to me.” “*Thomas Consitt*.” The plaintiffs did not see any of the documents till they paid their money. They retained in their hands the amount of freight payable according to the charter party, so that they might pay over the same to the owner or captain of the ship. The defendant interfered no further in reference to the cargo; and the plaintiffs ordered the ship to proceed from *Queen’s Town* to *Drogheda*; and they there took delivery of the cargo, in the usual way. The entire cargo delivered, instead of producing 1667½ quarters, produced 1614½, and no more, the deficiency being 53½ quarters. There was

no evidence to shew how the deficiency had been occasioned, or to connect the plaintiffs or defendant with previous knowledge of any deficiency. The corn was in bulk. Previously to the said sale and purchase, the corn had been examined on behalf of the defendant as to condition; and it was reported good, and so represented through the broker to the plaintiffs; but neither party before sale had measured it. On the quantity delivered being ascertained, the plaintiffs sent to defendant a debit note, of which the following is a copy.

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“ *Liverpool* 31st *January* 1853.

“ To *John Bingham & Co. Dr.*

“ For short delivery of Indian corn per *Prima Donna* from *Ibrahia*. Invoice quantity $1667\frac{1}{8}$ quarters.

Quantity delivered $1614\frac{1}{8}$ “

 $53\frac{1}{8}$ quarters.

$53\frac{1}{8}$ quarters of Indian corn at 30/ per Qr. £79 13 0

less freight at 10/3 . . £27 4 3

due *J. B. & Co.* £52 8 9”

The plaintiffs sought to recover in the present action the unabandoned portion of the claim, namely 50*l.* The defendant did not offer any evidence. The judge gave a verdict for 50*l.* for the plaintiff, in whose favour he found the facts as above set forth; from which verdict the defendant appealed.

The question for the opinion of the Court of Queen's Bench was, whether the decision of the judge was correct.

C. Milward, for the appellant, defendant in the plaint.

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The question is one depending on the construction of the contract set out in the case. The appellant says that it was a sale of the right to receive the cargo, at the price calculated from the bill of lading, whether that turned out to be more or less than the real quantity. It is to be observed that, when the contract was made, the shipping documents were not in *Liverpool*. The parties meant to sell the cargo; but they did not know what quantity was in it: they made a guess, and in the contract represent it to be "about 1300 quarters." They might have named a lump sum for the price, calculating it for themselves at 30s. a quarter; but, as they knew that the bill of lading would mention the quantity in *Ibraila* measure, both sides were willing to take their chance of that being more accurate than the guess they have made. They therefore agree to calculate the lump sum to be given for the entire cargo, by reference to the number of kilos. mentioned in the bill of lading. No other meaning can be put on the words "The quantity to be taken from the bill of lading and measure calculated at 220 quarters = 100 kilos." The payment is to be made on the delivery of the shipping documents; which must be done before the purchaser could name the port of discharge, and therefore before the cargo could be discharged. *In re Walsh* (a) was decided on a similar contract. [Lord Campbell C. J. In that case this point did not arise.] No warranty as to the quantity can be implied; *Dickson v. Zizinia* (b). [Lord Campbell C. J. The respondents do not say there is a warranty. They say that the construction of the contract is that the parties took a mode of estimating

(a) 1 E. & B. 383.

(b) 10 Com. B. 602.

the probable number of quarters, on which probable estimate they were to pay in the mean time, but still that this was a sale per quarter.] In *Hastie v. Couturier* (a) it was held that a somewhat similar contract was a sale of the cargo. [Lord Campbell C. J. The cargo may perfectly well be at the risk of the purchaser, although the price is according to the quantity. These cases are really not *ad rem*.]

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Willes, *contra*. The whole question is, whether this is a sale at so much a quarter of the actual quantity, or, as the appellant must contend, a speculative wager on the accuracy of the bill of lading. The last is unlikely. The bill of lading in this case declares that the quantity is unknown to the master signing it (b). But there is another practical objection arising on the appellant's construction. In the course of business, cargoes afloat are very often sold at a price per quarter, to cover cost, freight and insurance, payment on handing the shipping documents. In all such cases the practice is to pay in the manner which the case shews the parties to have adopted here; the purchaser retains out of the price that which he will have to pay as freight on the actual delivery; and that sum so retained is, like the price, calculated on the hypothetical number of quarters. In the present case the invoice shews that the vendors retained 854*l.* 12*s.* 10*d.* as the freight of 1667½ quarters at 10*s.* 3*d.*, and paid over the balance of the price of 1667½ quarters at 30*s.* Now, when the ship arrived, there were but 1614½ quarters; consequently the res-

(a) 9 *Exch.* 102, in *Exch. Ch.*, reversing the decision of the Court of Exchequer in *Couturier v. Hastie*, 8 *Exch.* 40.

(b) This is common in bills of lading for corn brought from the *Danube*.

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pondents paid for freight only 827*l.* 8*s.* 7*d.*, or 27*l.* 4*s.* 3*d.* less than the sum retained. If therefore the sale was of the cargo, whether more or less, for the lump sum of 2501*l.* 8*s.*, the appellant must be entitled to recover 27*l.* 4*s.* 3*d.* from the respondents. If, on the other hand, the quantity had proved just as many quarters more, then the purchasers would have had to pay to the shipowner 27*l.* 4*s.* 3*d.* more than the sum retained; and on that construction they would be entitled to recover that sum. In other words, the appellant's construction leads to the conclusion that the vendor has an action against the purchasers if the quantity is less than represented and the purchasers have an action against the vendor if it be more. This would be an extraordinary consequence; yet it must follow unless the words "about 1300 quarters" "at 30*s.* per quarter" be taken to shew that the payment is to be according to the actual quantity, and that the reference to the bill of lading was merely as a mode of present measurement on which to pay before the cargo was delivered, and the quantity ascertained. The bill of lading is like the assayer's certificate in *Cox v. Prentice* (a); and the excess paid may be recovered back.

C. Milward was heard in reply.

Lord CAMPBELL C. J. We are called upon to put a construction upon this contract; and in doing so we can derive no benefit from any cases in which the contract construed has not been the same, or the point has not arisen. Looking to the terms of this contract,

(a) 3 M. & S. 344.

and finding no case in which a similar question has been considered, I must say what, taking the whole contract together, appears to have been the intention of the parties. It seems to me that the intention was that the cargo was to be sold, and paid for according to the bill of lading, for better or for worse, whether the quantity should be more or less. It is no wager, but a fair mercantile speculation; the parties represent that the quantity which is unknown to them is about 1300 quarters: but both parties may well suppose that the quantity described in the bill of lading will be pretty accurate; and they may agree that they will take the risk on the one hand of its being a little more than the real quantity, on the other a little less. I think the words used shew an intention to take this risk, and to make the price depend on the quantity in the bill of lading. If the quantity delivered is less the purchaser will suffer; if it turn out more he will gain.

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COLERIDGE J. The question is purely on the construction of the contract. Like many others, this contract is so worded as to admit of doubt; but, on the whole, I think it is to be construed as a sale of the cargo, presumed by the parties to consist of the quantity in the bill of lading, and to be taken and paid for as if it were that quantity, whether it might be more or less. The sale is of a cargo afloat. There are therefore two important points not ascertained, its quality and its quantity. As to the quality, they agree to take it "as it stands;" and, as there is a mode by which the quantity may be roughly ascertained by reference to the bill of lading, they agree to the quantity as it appears on that.

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ERLE J. (a). This contract is to be construed, according to the general rule, by giving effect if possible to every part of it. It begins Sold "the cargo" "as it stands, consisting of about thirteen hundred quarters *Ibraila* Indian corn, at the price of thirty shillings per impl. quarter." Had it stopped there, it would have been a sale per quarter, and the price would have depended on the actual measurement; but then it goes on, "the quantity to be taken from the bill of lading." The bill of lading not being then at hand, the contract provides for the translation of the common *Ibraila* measure into quarters, so that when the bill of lading arrives it will express the quantity in quarters. Now I think we should not give effect to the clause, "the quantity to be taken from the bill of lading," if we construed the contract as requiring a subsequent measurement: and such a construction would be inconvenient. The bill of lading may well pass from hand to hand; and it is very possible that the vendors here had themselves acquired the shipping documents, under just such another contract with a third person. Such at least is often the case. It seems to me that the reasonable construction of the whole contract is, that the purchaser is to pay according to the quantity named in the bill of lading, whether that quantity ultimately turns out to be more or less than the quantity actually delivered.

Appeal allowed, with costs.

(a) *Wightman J.* was absent.

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JOHN WILLIAM GOTT and ARCHIBALD FARQUHARSON *against* JAMES GANDY.

Friday,
November 11th.

COUNT: that plaintiffs were tenants to defendant of certain workshops, buildings and premises from year to year; and, during the tenancy, and whilst plaintiffs were in the occupation of the premises as such tenants to defendant, "a certain chimney, parcel of the said premises, without any neglect or default on the part of the plaintiffs, became and was in an insecure state and condition, and in danger of falling from want of substantial repairs in that behalf; of all which the plaintiffs then and long before the day hereinafter mentioned gave notice to the defendant. Yet the defendant, not regarding his duty in that behalf, did not nor would at the time of such notice, or in a reasonable time thereafter, or at any time," repair the chimney, which afterwards, and during the tenancy, on 27th *December* 1852, fell, and damaged plaintiff's goods.

Demurrer. Joinder.

Unthank, for the defendant. This declaration does not shew that the defendant was bound to do these repairs, unless such a duty results from the mere relation of landlord and tenant from year to year. It is true that the tenant from year to year is not bound to do substantial repairs; but neither is the landlord. For a bare nonfeasance in not repairing no action at all lies;

Count by tenant, from year to year, of a house, against his landlord, for neglecting to do substantial repairs to the premises after notice that they were in a dangerous state; per quod the premises during the tenancy fell and injured plaintiff's goods.

Demurrer.

Held: That the declaration was bad in substance: no obligation to do substantial repairs on notice being implied by law from the relation of landlord and tenant.

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per *Twisden J.* in *Pomfret v. Ricroft (a)*. Even if the house be totally destroyed, the landlord is not obliged to rebuild; but the tenant is obliged to pay rent; *Pindar v. Ainsley*, cited by *Buller J.* in *Belfour v. Weston (b)*, *Baker v. Holtzaffell (c)*. [He was then stopped by the Court.]

J. A. Russell, contra. *Monk v. Cooper (d)* seems to have been the first case in which it was held that the destruction of the premises was no answer to an action for rent: but it is no authority to shew that it may not be the ground of a cross action. The Court in that case say: "If the defendant has any injury, he will have his remedy; but he cannot set it off against the demand for rent." [*Erle J.* That does not seem to me to be an expression of opinion that he had a wrong and a remedy, but merely that, if he had a wrong, he must pursue the proper remedy. Lord *Campbell C. J.* The onus undoubtedly lies on the plaintiffs to shew that there is such a duty in the defendant. I am not aware of any authority for the position that the landlord is bound to repair, even under the circumstances stated in the declaration, that is, having notice that for want of substantial repairs the premises are dangerous. Can you furnish us with one?] More cannot be said of the authorities than that none are against such a position. [Lord *Campbell C. J.* The absence of authority is strong, but not decisive. Can you shew us any legal principle, from which it may be fairly argued that such a duty would arise?] The landlord ought to keep his house in such a state that his

(a) 1 *Saund.* 321, 322.(b) 1 *T. R.* 310, 312.(c) 4 *Taunt.* 45.(d) 2 *Strange*, 762.

property may not injure others. His duty follows from the maxim, *Sic utere tuo ut alieno non lædas*.

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LORD CAMPBELL C. J. I am of opinion that this declaration is bad in substance. Unless the declaration shews a state of things from which the law implies a duty to do those things, which the defendant has not done, the general allegation "the defendant, not regarding his duty" &c., goes for nothing. Now let us see what are the facts alleged. They are these: the defendant was landlord of premises which were let to the plaintiffs from year to year: during the tenancy the premises were in a dangerous state for want of substantial repairs: the defendant had notice from the plaintiffs, and was requested to repair them, and did not do so. Whence does the legal duty to repair these premises on request arise? There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are actors, to establish, on authority or on principle, that this obligation results from the relation of landlord and tenant. *Mr. Russell* can produce no authority in his favour, not even a dictum. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises. It is clear to my mind that, though, in the absence of an express contract, a tenant from year to year is not bound to do substantial repairs, yet, in the absence of an express contract, he has no right to compel his landlord to do them.

COLERIDGE J. In such a matter as this the absence of authority seems to me almost conclusive. We find our books full of authorities bearing on points all round

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this; and, if there were any such legal obligation as is contended for, it would surely be mentioned. And on principle it seems to me that the duties between landlord and tenant arise from contract, and that there is no such contract as is here supposed.

ERLE J. (a). The absence of authority to shew a duty as between landlord and tenant is very strong against the existence of such a duty. For the relation of landlord and tenant is a very ancient legal relation, and has always been a very common one; and, as there must have been a strong interest in numerous cases to enforce such a duty if it existed, the absence of authority is almost decisive. And on principle I think that, not only is no principle shewn from which this duty might be inferred, but that the plaintiffs ask us to violate a very important legal principle. For it is most important that parties making a contract should be permitted to regulate the terms for themselves, and that Courts of law should decide upon the terms which it appears to have been the intention of the contracting parties to agree upon. The present action is in form an action for a wrong; but it is in substance for the breach of a duty arising from a contract between landlord and tenant. The plaintiffs ask us to interpolate into that contract a term without shewing anything from which it might appear that it was intended by the parties that there should be such a term.

Judgment for defendant.

(a) *Wightman J.* was at *Guildhall*.

1853.

Bannerman
White
 10C 5NS 847

HENRY GOMPERTZ *against* THOMAS BARTLETT.

Monday.
 November 14th.

ACTION for money had and received. Plea: Never indebted. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the sittings at *Guildhall* after last *Trinity* Term, it appeared that the defendant, in *London*, sold to the plaintiff a bill of exchange purporting to be drawn at *Sierra Leone* by *Jolly & Co.* of that place on *Bellot & Co.* of *London*, and accepted by *Bellot & Co.* payable to the order of a third person in *London*. The instrument was indorsed in blank by the payee: it was unstamped; but both parties believed it to be a foreign bill and consequently to require no stamp. The defendant did not indorse the bill; and it was a sale without recourse. The plaintiff paid 815*L.* to the defendant, as the price of the bill, which was handed to plaintiff; and he, in like manner, sold the bill to another person, also without recourse. Before the bill attained maturity, all the parties to the bill became bankrupt. On the holder seeking to prove against the estate of the acceptor, it was discovered that the bill, though bearing the genuine signature of a *Sierra Leone* firm, had, in fact, been drawn by one of the partners in this kingdom, and consequently was unavailable for want of a stamp. The Commissioners in Bankruptcy refused to allow the proof. The holder demanded back from the plaintiff

An unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect.

Held: that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold. Though it would have been otherwise (the sale being

without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill.

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the price paid to him: and the plaintiff, under threat of legal proceedings, paid him. The plaintiff now sought to recover from the defendant 815*l.*, the price of the bill, as money paid on a consideration which had failed. It was admitted that the defendant, at the time of the sale, *bonâ fide* believed the bill to have been drawn at *Sierra Leone*; and neither fraud nor negligence was imputed to him.

The Lord Chief Justice directed a nonsuit, with leave to move to enter a verdict for the plaintiff. *Petersdorff*, in this term, obtained a rule *Nisi* accordingly.

M. Chambers and *Pearson* now shewed cause (*a*). As the bill was in this case sold without recourse, nothing turns on the peculiar character of a bill of exchange: the case is the same as if this had been the sale of any other specific chattel, sold without a warranty. In such a case the maxim *caveat emptor* applies; *Parkinson v. Lee* (*b*), *Chandelor v. Lopus* (*c*). [Lord Campbell C. J. If the purchaser receives what answers the description of the article sold, he cannot, in the absence of a warranty, recover for a defect in its quality: in such a case, *Caveat emptor*. But it will be put against you here, that you sold a foreign bill, and that the thing delivered was not a foreign bill at all.] Foreign is only a quality; this was a bill not altogether void; for, though under the stamp laws it cannot be made available in a court in this country, it may be enforced abroad. [Lord Campbell C. J. That depends on whether the stamp

(*a*) The argument was not finished on this day, and was concluded on November 16.

(*b*) 2 *East*, 314.

(*c*) *Cro. Jac.* 4. See authorities collected in *Morley v. Attenborough*, 3 *Esch.* 500.

Acts avoid the bill altogether, in which case it cannot be enforced anywhere, or only affect the remedy in this country.] It seems difficult to distinguish the present case from *Chandelor v. Lopus* (a), where a stone was sold, affirming it "to be a bezar stone;" "ubi re verâ it was not a bezar stone," and the vendor was held not liable in the absence of knowledge. In this case a bill is sold, the vendor affirming it to be a foreign bill, ubi re verâ it was not a foreign bill, but the vendor does not know it. *Jones v. Ryde* (b), *Shove v. Webb* (c), *Waters v. Mansell* (d) and *Kempson v. Sanders* (e) may probably be cited on the other side, but are all distinguishable. In *Jones v. Ryde* (b) the instrument was a forgery; that is, it was not a bill at all. In *Shove v. Webb* (c) and *Waters v. Mansell* (d) the Annuity Act in terms avoided the transaction. In *Kempson v. Sanders* (e) the Court considered the sale of such shares as were there sold not valid on grounds of public policy.

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Petersdorff, contra. There is no question here of warranty. The plaintiff's proposition is, that, if a thing was sold as being an article of a specific description, and if, from a latent defect, unknown to both parties, it was in substance not an article of that specific description, but an article of no value, the purchaser is entitled to recover back the price he has paid for it; not on the ground of a breach of warranty, but because he has paid for the thing sold, and what he has received is not the thing sold, but of a different kind. In the present case, there was the sale of what purported to be a foreign

(a) *Cro. Jac.* 4.(b) 5 *Taunt.* 488.(c) 1 *T. R.* 732.(d) 3 *Taunt.* 56.(e) 4 *Bing.* 5.

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bill conveying to the holder certain legal rights against the parties to the instrument. On account of a latent defect it was not a foreign bill, and was unavailable, and conveyed to the holder no more legal rights against any one than if it had been forged. *Young v. Cole* (a) is much in point. Tindal C. J. there says that the plaintiff "delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real *Guatemala* bonds, such as were saleable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." In the present case, the bill did not appear to have been drawn in this country, and consequently the purchaser could not know that, not being stamped, by stat. 31 G. 3. c. 25. s. 19. it was not to be "admitted in any Court to be good, useful, or available in law or equity:" in *Young v. Cole* (a) the want of a stamp was a patent defect. In 1 *Addison On Contracts* (2d edition) 152, it is said: "So if a man goes into the money market with a bill of exchange or a promissory note, and gets it discounted without putting his own name on the back of it, he is not bound to refund the money he receives, if the parties to the bill or note become insolvent and the bill is dishonoured; but, if it is not the bill or note of the parties whose names appear upon it, if it is a spurious

(a) 3 *New Ca.* 724. 730.

document or a forgery, then the money received in exchange for it cannot lawfully be retained. If the party who negotiates it does not indorse it, he does not subject himself to that responsibility which the indorsement would bring on him; but his declining to indorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description which turns out not to be such as it is represented to be. Where Bank of England notes are taken, the party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes, but he is answerable for their being such as they purport to be." For this *Jones v. Ryde* (a) is cited; and the passage is in fact an abridgment of the judgments in that case.

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Lord CAMPBELL C. J. At the trial, I was impressed with the consideration that this was a transaction of pure sale, and that the vendor really had title to the bill which he sold, and was perfectly ignorant of the latent defect. Besides, the bill would probably have in fact been paid had the parties to it continued solvent; and on the whole I was then inclined to think that the defect was merely one in the quality, which the vendor did not warrant. But, now, having heard the argument, I think that the action is maintainable, on the ground that the article does not answer the description of that which was sold, viz. a foreign bill. There was no written statement or direct assertion that this bill was drawn at *Sierra Leone*; but it purported to be so drawn; and it must be taken that it was sold by the description

(a) 5 Taunt. 488.

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of a bill drawn at *Sierra Leone*. In fact it was drawn in *London*; and, on that account, it could not be enforced. If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser; but this is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered as paid in mistake of facts. The law is, I think, accurately laid down in the passage cited from *Addison On Contracts*. If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable; but he is answerable if the bill be spurious. *Jones v. Ryde* (a) and *Young v. Cole* (b) are strongly in point. *Young v. Cole* (b) is indeed a very strong case; for the things sold there as *Guatemala* bonds were in one sense of the words *Guatemala* bonds; but they were not what was professed to be sold, viz. bonds binding on the *Guatemala* Government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.

COLERIDGE J. I am of the same opinion. What took place at the time of the sale was merely that the vendor did not indorse the bill, and stipulated in effect that this should be a sale without warranty. That being so, the vendor was not bound to see that he sold a bill of good quality, or to answer for the insolvency of the parties; but the vendee is still entitled to have an article answering the description of that which he

(a) 5 *Thunt.* 488.

(b) 3 *New Ca.* 724.

bought. Here he bought, as a foreign bill, what turns out not to be a foreign bill, and therefore valueless. Common justice requires that he should have back the price.

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WIGHTMAN J. I agree upon this ground, that what was sold purported to be a bill drawn at *Sierra Leone* and available against the parties to it, but, so far from answering that description, was a bill not drawn at *Sierra Leone*, but in *England*, and, being unstamped, was unavailable. Wherever the article answers the description by which it is sold, and it turns out that there is a latent defect, in the absence of fraud and warranty, the vendee must take it with all faults. But this is a case in which it does not answer the description. And therefore on the authorities, more especially on that of *Jones v. Ryde* (a), the plaintiff is entitled to recover (b).

Rule absolute (c).

(a) 5 Taunt. 488.

(b) *Erle J.* had gone to Chambers.

(c) See the *Digest*, lib. xviii. tit. 1. *De Contrah. Emt.*; laws 9, 10, 11 and 14., where the subject of the principal case is discussed. The civilians seem to have come to the conclusion, "Si" "as pro auro veneat non valet," aliter "si aurum quidem fuerit, deterius autem quam emtor existimaret: tunc enim emtio valet."

1853.

ERROR FROM THE QUEEN'S BENCH.

The EASTERN ARCHIPELAGO Company *against*
the QUEEN on the prosecution of Sir JAMES
BROOKE.

A charter,
incorporating
a trading com-
pany, directed,
amongst other
things, that the
Corporation

ERROR from a judgment quod cancelletur, in sci-
re facias to repeal a charter of incorporation.

The pleadings are stated in the report of the case

should not begin business until it had been certified to the President of the Board of Trade, by at least three of the Directors, that at least one half of the capital had been subscribed for, and at least 50,000*l.* paid up. The charter contained a proviso that, in case the Corporation should not comply with any "the directions and conditions in Our said letters patent contained, it should be lawful for the Queen," "by any writing under the great seal or under the sign manual," "to revoke and make void" the charter, "either absolutely, or under such terms and conditions as" the Queen should think fit. In sci. fa., at the relation of a private prosecutor, it was suggested, amongst other things, that, before the Corporation began business, a certificate was given by the Directors to the President of the Board of Trade that 50,000*l.* had been paid up, which certificate was false in fact to the Directors' knowledge; and, on a traverse of this, the verdict passed for the Crown. Judgment quod cancelletur having been entered in the Q. B., and error brought in Exch. Ch.:

Held, by *Jervis C. J., Pollock C. B., Cresswell, Williams and Talfourd Js., and Platt and Martin Bs.*, that the judgment was correct. *Parke B.* dissentiente.

All the Judges agreed that for an abuse of the franchise by matter dehors the conditions the sci. fa. would lie: and that, unless the proviso had the effect of controlling the conditions, the sci. fa. would also lie for the breach of express conditions; and that the fiat of the Attorney General for a sci. fa. to repeal a charter for abuse, or for breach of a condition express, or implied, was as of right to every subject grieved, though not as of course to any subject asking for it. But

Parke B. held 1st: that the giving of a false certificate was a breach of the express conditions in the charter only, and not an independent abuse by matter dehors these conditions; *Jervis C. J., Cresswell J. and Martin B.* holding the contrary; the other Judges not expressing their opinions on this point.

Parke B. held 2dly: that the true construction of this charter, including the proviso, was to shew an intention on the part of the Crown to make a writing under the great seal or sign manual a condition precedent to the forfeiture of the charter for breach of any express condition; *Martin B.* inclining to agree in this; *Jervis C. J., Pollock C. B., Cresswell J., Platt B., Williams J. and Talfourd J.* holding that such an intention did not appear.

Parke B. held 3dly: and *semble per Martin B.*: that it was competent for the Crown, by apt words in a charter, to attach such a condition precedent to the forfeiture of a franchise for express condition. *Jervis C. J., Pollock C. B. and Cresswell J.* dubitantibus, at least where the condition affects the interests of other subjects.

below (a). The following statement of the material parts is taken from the judgment of *Martin B.* in the present case.

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“ This is a writ of error upon a judgment of the Court of Queen’s Bench in an action of *scire facias*, at the suit of the Crown on the information of Sir *James Brooke*, wherein it was prayed that certain letters patent of incorporation granted to *The Eastern Archipelago Company* should be annulled, and the letters patent restored to the Court of Chancery to be cancelled.

“ The writ sets out the letters patent, dated the 17th July 1847, whereby, after reciting that it had been represented to Her Majesty that certain persons had agreed to subscribe a capital of 200,000*l.* to be divided into 2000 shares of 100*l.* each, and to form a company or partnership called *The Eastern Archipelago Company* for the purpose of purchasing, and dealing and making profit with, land and the produce thereof, in the Island of *Labuan*, and the lands adjacent, and for raising coal, minerals and metals, and of trading and trafficking with the inhabitants of the said island, and of exporting therefrom its produce, and importing thereto such articles as the Company thought proper, and that the said persons had besought Her Majesty to grant them Her Royal Charter, Her Majesty granted to the said persons, and to such other as might be members of the said Company and should hold shares therein of not less than 100*l.* each, that they should be a body politic and corporate by the name of *The Eastern Archipelago Company* for the purposes before mentioned, and by that name should sue and be sued, but subject to the directions and provisions in the said charter contained. The charter

(a) 1 E. & B. 310.

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then proceeded to direct that a court of Directors should have power to enter into all contracts, and to do all acts which they should consider necessary for the well ordering the affairs of the Corporation, and to execute all powers in relation thereto, and to bind the Corporation as if the same was done by the whole body, so as the same was done in conformity with the charter, and of the deed or deeds to be thereafter executed. The charter then proceeded to provide for the custody of the common seal, and to authorize the purchase of land in mortmain, and proceeded thus. 'And We do hereby further direct that the sum of 100,000*l.*, at the least, being one half of the aforesaid capital of the said Corporation, shall be subscribed for within twelve calendar months from the date of these presents, and that the sum of 50,000*l.*, at the least, shall be paid up within such period.' The charter then proceeded to provide for the execution of a deed of settlement, and the deposit of a copy thereof with the Board of Trade, and proceeded thus. 'And We do hereby further direct that the said partnership shall not begin business until it shall have been certified to the President of the said Board of Trade, by at least three of the Directors of the said Company, that at least half of their capital beforementioned had been subscribed for, and the said sum of 50,000*l.*, at the least, paid up; such certificate of the said Directors to be indorsed on the said charter.' The charter then proceeded to provide for the increase of the capital of the Company, and the borrowing of money, and proceeds thus. 'Provided always, and we do hereby will and declare, that, in case the said Corporation shall fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the

period before limited in that behalf, and subject as aforesaid, or in case the said Corporation shall not comply with any other the directions and conditions in these Our letters patent contained, it shall be lawful for Us, Our heirs and successors, by any writing under the great seal or under the sign manual of Us, Our heirs or successors, to revoke and make void this Our Royal charter and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as We or they shall think fit.' Then there follow provisions for the revocation of the charter by the Crown, for the dissolution of the Company by their own act, for the enrolment of the deed of settlement in the Court of Chancery, and for the recognition of the charter by all Courts and persons; and it proceeds thus. 'Provided always, and We do hereby express and declare that this Our royal charter is granted upon the express condition, that the said partnership hereby incorporated shall, at all times during the continuance of the said Corporation, abide by and conform to all and every the directions which may be given to the said Corporation by any one of the principal secretaries of state of Us, Our heirs or successors, as regards the intercourse and dealings by the said Company with any foreign state or power.' And the charter concluded in requiring all Governors &c. to give full force and effect to the said letters patent. The writ then proceeds to aver various alleged breaches of the charter, and, amongst others, that the sum of 50,000*l.* of the capital of the Company had not been paid up within the period of twelve calendar months from the date of the charter; and that, although the Company began to trade upon a certain day, viz. the 30th *June* 1849, yet at that time

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the 50,000*l.* had not been paid: and nevertheless it had been certified, in the manner directed by the charter, to the President of the Board of Trade by the Directors of the Company, that the sum of 50,000*l.* had been paid; whereas at the time of the making the certificate it had not been so paid, *as the Directors well knew.*

“The defendants below pleaded several pleas, the issues upon which, with the exception of those upon the 5th, 10th and 13th pleas, were found for them. The 5th plea traversed the averment that the 50,000*l.* had not been paid up; the 10th, the averment that at the time when the Company began to trade the 50,000*l.* had not been paid up; and the 13th, the averment that at the time of the giving the certificate of the 50,000*l.* having been paid that it had not been so paid. There was no plea or traverse as to the averment of the Directors’ knowledge that this sum had not been paid. The issues upon these three pleas were found for the Crown. A motion was made on behalf of the defendants in arrest of judgment; and, after argument, the Court of Queen’s Bench were equally divided in opinion. Mr. Justice *Erle* and Mr. Justice *Coleridge* being in favour of the defendants, and Mr. Justice *Wightman* and the Chief Justice in favour of the Crown. The judgment therefore was not arrested, but was given for the Crown: and upon it the present writ of error has been brought.”

The case was argued in last *Easter* term (a).

Crowder, for the plaintiffs in error, defendants below. The declaration is not sufficient, inasmuch as it contains no averment that the Queen has by any writing under

(a) On *April* 30th and *May* 4th.

the great seal or under the sign manual revoked the letters patent. The necessity for doing so arises from the proviso in the charter. The Crown tells the parties applying for a charter that, if they accept it, they must take it subject to a condition, such as would not be imposed by common law, and that in case that condition is broken the charter shall be forfeited: it is competent for the Crown to add a qualification, and say it shall be a condition precedent to the enforcement of the forfeiture that there shall be a writing under the great seal or the sign manual. The main question is, whether the intention appears, on the charter, to be to attach such a condition precedent to the revocation of the charter for breach of any one of what are called the conditions and directions. These are very numerous and of very different degrees of importance. It is not therefore reasonable that on the breach of any one of them the charter should be absolutely forfeited, whether the breach go to the root of the consideration for granting the charter or not. That would be a ground for construing these to be mere directions, not conditions, if this were the deed of a subject, note (4) to *Pordage v. Cole* (a); and the reason is equally strong to shew that such was the intention of a royal grant. Again, the proviso for a writing under the sign manual is idle, if the intention was that the charter should be avoided merely by breach of any condition. It will be urged, against this construction, that affirmative words cannot take away a right, which is no doubt a general rule; but it is a *petitio principii* to say that this is a right. The analogy is to a proviso declaring a lease void on breach of condition, which only avoids it at the option of the lessor; *Doe dem.*

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(a) 1 *Wms Saund.* 320 a.

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Bryan v. Bancks (a); to such a condition as is created by the lease, and the enforcement of which may be subject to such terms as please those who create it; not to a common law incident. If on the neglect to deliver a copy of the deed for one hour after the day specified the charter were void, any subject might as a matter of right sue out a sci. fa. to cancel it; *Sir Oliver Butler's Case* (b), *Regina v. Aires* (c). To prevent so great a hardship seems to have been the object of the proviso. It may be said that an incident annexed by law cannot be taken away, and that the sci. fa. to repeal a charter or condition broken is an incident in law. That might be so if this was a condition implied by law: but, being a condition created by the Crown, it may be modified by the Crown.

Willes, contra. On this record it appears that the Queen has, on suggestions by certain persons, created a franchise not previously existing, and granted it to them on certain conditions. Amongst other conditions was one that, before the grantees should exercise the franchise by trading as a corporation, they should pay up 50,000*l.* and that the Directors should certify that fact. This condition was not complied with; for the 50,000*l.* was not paid up, and the Company by its Directors certified that it was paid up, they well knowing that it was not; and yet the Company carried on business as a corporation. That is not only a breach of an express and important condition in the charter, but it is also an abuse of the franchise, and a ground of forfeiture at common law. It is a condition

(a) 4 *B. & Ald.* 401.

(b) 2 *Ventr.* 344.

(c) 10 *Mod.* 354.

annexed by law to every royal grant, of whatever kind, that the consideration for the grant shall be fulfilled. To the grant of a franchise there is also a condition annexed by law, that the franchise shall not be abused; and it is an incident annexed by law to the grant of a franchise that on such abuse the charter may be avoided by sci. fa.; 2 *Bl. Com.* 153., *Com. Dig. Franchise* (G. 3), *The City of London v. Vanacre* (a). It has been thought that, in order to avoid a royal grant for breach of condition, a sci. fa. is necessary; *Peter v. Kendal* (b), 2 *Dyer*, 198 a, b, (pl. 50); though the practice always is to treat a patent for an invention as ipso facto void on breach of the condition to enrol a specification; but that would seem to be merely an inveterate error. But, whether indispensable or not, a sci. fa. to avoid a charter for breach of condition, or for abuse, is a legal incident attached to the grant; and, even if the grant in express terms professed to take away a legal incident, it could not avail. It would be an attempt to do what is against the nature of the thing and void, like an agreement that goods taken in distress should be irreplevisable; *Co. Litt.* 145. b.; or to give (at common law) an arbitrator irrevocable authority; *Vynior's Case* (c). Further, in the present case, it does not appear to be the intention of the grant to take away the sci. fa. All the words in the proviso are affirmative; and affirmative words are not construed as intended to take away what is given of common right, either in an instrument between subject and subject, or in an Act of Parliament; *Co. Litt.* 205. a., *The Earl of Cardigan v. Armitage* (d); much less in a royal grant, which must be construed favourably to the Crown.

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(a) 12 *Mod.* 270. 271.(b) 6 *B. & C.* 703.(c) 8 *Rep.* 81 b. 82 a.(d) 2 *B. & C.* 197.

1853. The apparent object was to give a fresh power to the Crown, not to take one away.

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Crowder was heard in reply.

Cur. adv. vult.

In the present Term (*November 2d*) the learned Judges, not agreeing in opinion, delivered judgment *seriatim*.

Martin B. MARTIN B., after stating the nature of the record as above (*a*), proceeded as follows.

The facts, which appear on the record, and upon which our judgment is to be given, are very short and simple. The Crown granted, and the defendants accepted, the charter set forth in the writ; and the defendants, in breach of clear directions contained in it, began business, before 50,000*l.* of the capital had been paid up; and the Directors falsely certified, by indorsement on the back of the charter, to the President of the Board of Trade, that this sum had been paid, they knowing at the time that it had not, and that their certificate was false. The judgments of the Judges are reported in *Regina v. The Eastern Archipelago Company* (*b*). Mr. Justice *Erle* and Mr. Justice *Cole-ridge* were of opinion that the proviso in the charter, which declared, in case "the defendants should fail to enter into and execute a deed of settlement, and deposit it as directed; or in case they should not comply with any other of the directions and conditions contained in the letters patent; that it should be lawful for the Crown, by any writing under the great seal or under

(*a*) Ante, p. 857 to p. 860.

(*b*) 1 *E. & B.* 324.

the sign manual, to revoke and make void the charter either absolutely or under such terms and conditions as the Queen thought fit," was a condition, properly so called, and that the provisions, whereby the Crown prescribed that the sum of 50,000*l.* should be paid up within twelve months from the date of the charter, and that the defendants should not begin business until it had been certified to the President of the Board of Trade that it had been paid, were directory only, and not of themselves conditions; and that, in order to avoid the charter and subject it to be annulled and cancelled by the judgment of a Court of Law, it was necessary that the Crown should, by writing under the great seal or sign manual, declare the charter to be void; and, inasmuch as it was not averred in the writ that the Crown had so done, the judgment ought to be arrested.

On the other hand Mr. Justice *Wightman* and the Chief Justice were of opinion that these two matters, which were called directions, were in legal construction conditions; and that the proviso above mentioned was cumulative, and added to the power of the Crown by enabling it, upon a breach, at once, of its own mere motion, to declare the charter void, without the necessity of issuing any *scire facias*, and thereon obtaining the judgment of a Court of Law: and it seems to have been thought that, even supposing it was essential that the will of the Crown to avoid the charter should be shewn to exist, it was sufficiently so shewn, inasmuch as the *scire facias* could not have issued without the fiat of the Attorney General. In the argument before us it was strongly urged on behalf of the Company, the plaintiffs in error, that the several matters so directed to be done could not of themselves be considered conditions. It

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was alleged, and, as it seems to me, with truth, that no case or authority was cited on the part of the Crown to shew that in grants by the Crown clauses so worded had ever been so construed; and that, by the application of the maxim "*Expressio facit cessare tacitum*," it was proved conclusively by the proviso, which provided for the revoking of the charter by the Crown either absolutely or upon terms, that the preceding clauses of themselves could not possibly be deemed conditions. It was contended that such a construction would be utterly inconsistent with this proviso, and that the charter itself, which contained another condition properly so called, viz. that for the conformity by the Company to the direction of a Secretary of State as regarded their intercourse and dealing with foreign powers, proved that the directory clauses were not conditions or intended to be so: and it was also very strongly urged that to hold these directions to be conditions would be a most violent and unjust construction of the Crown's grant; and that the true mode of construing such a grant is to take it in its usual and ordinary meaning, and according to the intent of the Crown as appears by the words of the charter; and *The Case of Alton Woods* (a) was cited in support of this view of the case. It was also contended that the fiat of the Attorney General for the issuing of the writ of *scire facias* was not equivalent to a writing under the great seal or under the sign manual, or any evidence that such writing had issued, or indeed any evidence of the Queen's will at all: that it was true that a *scire facias* could not properly be issued out of the office without the Attorney General's

(a) . 1 Rep. 40 b.

fiat, note (4) to *Underhill v. Devereux* (a); so neither could a writ of error in criminal cases without a similar fiat: but it was urged that the necessity for this fiat has nothing to do with the will of the Crown, but was merely a provision to prevent frivolous and vexatious writs of scire facias or of error, and that, when reasonable cause existed, both those writs were of right. This view of the nature of the Attorney General's fiat seems to me to be in accordance with what is stated in 4 *Blac. Com.* page 392, where it is said that writs of error in criminal cases "are not to be allowed of course, but on sufficient probable cause shewn to the Attorney General; and then they are understood to be grantable of common right, and ex debito justitiæ." So also, in *Rex v. Wilkes* (b), Lord *Mansfield* explains that a writ of error in a criminal case cannot issue without the fiat of the Attorney General, who always examines whether it be sought merely for delay or upon a probable error: and he stated the meaning of the ten Judges in *Regina v. Paty* (c) to be, that the writ was not a writ of course, but that when there was probable error it ought not to be denied. And this is in precise conformity with what is said in *Sir Oliver Butler's Case* (d) in respect of the writ of scire facias to repeal a patent: viz. that, where a patent is granted to the prejudice of the subject, the King is of right to permit him upon his petition to use his (The King's) name, for the repeal of it, in a scire facias at the King's suit. The issuing of writs of Mandamus and Quo Warranto by the Court of Queen's Bench seems also analogous; these writs are not issuable of course; that is, an individual cannot go to the office and demand

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(a) 2 *Wms. Saund.* 72 u.(b) 4 *Burr.* 2527. 2550.(c) 2 *Salk.* 503.(d) 2 *Vent.* 344.

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them; he must first shew to the Court reasonable cause for their issuing: but, upon shewing such cause, the Court is bound by the law to grant them; and they are ex debito justitiæ, in the sense that the Court would act contrary to law, if, under such circumstances, it refused to permit them to issue. It was therefore contended that the issuing of the fiat, by the Attorney General, amounted to nothing more than intimating his opinion that the writ of scire facias was not for purposes of vexation or oppression, but bonâ fide, and in order to obtain the decision of a court of law upon a real question in controversy. It was also urged that there was no difficulty in the construing of the charter if the provisions in question were deemed to be directory only; and that it would be a very harsh construction of a charter of the Crown, to hold that, although all possible care had been taken to comply with its provisions, and the Directors had every reason to believe that the 50,000*l.* was paid up when they began to trade, yet, if, by an unavoidable and unexpected accident, a small sum was deficient, that therefore the charter was wholly void; and again, if the Directors, honestly believing that the 50,000*l.* had been paid up, had with perfect bona fides given a certificate to this effect, when through an accident a trifling deficiency to the extent even of a single farthing existed, then, if these provisions were really conditions, the charter was gone, whilst, if the ordinary natural construction was given to the charter, these provisions would be considered to be directory only: and, although the Queen might, if she thought fit, give to them the effect of conditions, and, by reason of the non-compliance with them, by writing under the great seal or the sign manual revoke the charter and make it void,

nevertheless the mere non-compliance of itself would not have this effect: and that by this construction the Crown would at once keep in its own hands the means of enforcing obedience to the charter, and at the same time prevent the destruction of it by reason of slight and unintentional deviations from it. If I thought that the decision of the case depended upon the correctness of the argument to which I have just referred, I would be very strongly inclined to concur in it. But a view of the case which, so far as I can collect, was not under the consideration of the Court of Queen's Bench at all, has been submitted to us, viz. that, quite independent of the peculiar wording of the charter, and whether the provisions contained in it be directions or conditions, there appeared upon the record that there has been such an abuse and misuser of the privileges conferred by the charter as entitled the Crown to have it annulled; and the argument of the learned counsel on behalf of the Crown has satisfied me that this is the correct legal conclusion upon the facts appearing upon the record. I find it laid down that a corporation may be dissolved for either of these two causes, misuser or abuse; and that there is a *tacit or implied condition* annexed to all such grants as the present, that they shall not be misused or abused, and that, if they be, the charter or franchise is forfeited. In *Rex v. The City of London* (a) Lord Holt lays down, in regard to a corporation or a body politic to which a trust is annexed, that any maladministration of it is a cause of forfeiture, and that it may therefore be dissolved; and again, in *The City of London v. Vanacre* (b), the same eminent Judge states

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(a) *Skinner*, 310.

(b) 12 *Mod.* 271.

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that all franchises are granted upon condition that they shall be duly executed according to the grant, and if the parties to whom they are granted neglect to perform the terms of the patent it may be repealed by scire facias. In *Comyn's Digest*, title *Franchise* (G 3.), it is stated that a franchise or a corporation may be forfeited by breach of the trust upon which they were granted and perversion of the end of the grant or institution; and Mr. Justice *Blackstone* in his *Commentaries*, vol. 1, p. 485, lays it down that a charter is forfeited by abuse of its franchises; "in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void." It seems to me that this is the consequence which the law attaches to misuser or abuse of a charter, and that the Crown could not legally grant a charter with a proviso that, in the event of a misuser or abuse, it should be reserved to the Crown, of itself only, to revoke or make void the grant either absolutely or upon terms. In my judgment, the law intervenes upon the misuser or abuse of a charter, and that it therefore becomes voidable, and that the Crown has no power to intercept the operation of the law upon it. Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the Crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them. The authorities to which I have referred have satisfied me that, quite independent of the question whether the provisions in the charter be in the nature of directions or conditions properly so called, if there has been a mis-

user or abuse of it, it thereby becomes subject to be annulled by the judgment of a competent Court of Law; and that the real question in the present case is, Does there or not appear on the record that there was such conduct on the part of the Directors (being the managing body of the Company) as amounted to a misuser or abuse of the charter? And, after the best consideration I can give to the question, I think it does so appear.

The charter was for the purpose of enabling a Corporation to trade: and it provided that, before any trading was commenced, 50,000*l.* of the capital should be paid up, and a certificate to that effect delivered by the Directors to the President of the Board of Trade. These provisions were, in my opinion, of the utmost importance. The actual payment of so large a sum as 50,000*l.* was eminently calculated to prove the honesty and bona fides of the enterprise, and to justify the Crown in granting to certain individuals the extremely valuable privilege of trading with a limited responsibility, thereby conferring upon them a very considerable advantage over the others of Her subjects, who might engage in the same trade. It would also afford to persons, entering into contracts and doing business with the Company, a present and tangible fund for the performance of its engagements: and the certificate to the Board of Trade would naturally satisfy every one that this sum had been really paid up. Now the record shews, not merely that this sum was not paid when the Company began to trade, but that the Directors knowingly delivered to the President of the Board of Trade a false certificate that it had been so paid. In my opinion, such conduct amounted to a gross abuse and misuser of the privileges conferred by the charter, and

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that, quite independent of the form of language in which it is framed, the Corporation, so conducting itself by its governing body, forfeited the franchise conferred upon them. It was a proceeding in direct defiance of the provisions of the charter, accompanied by a wilful false statement to the President of the Board of Trade, in regard to a matter which the charter required to be stated with truth. I have had some doubt whether the misuser or abuse should not have been distinctly or in terms averred in the writ as such: but, after much consideration, I am satisfied that this is a matter of law to be taken judicial notice of by the Court: and, as it appears upon the record that the Company commenced trading without 50,000*l.* being paid up, and that the Directors falsely, to their own knowledge, certified to the President of the Board of Trade that it had been paid, I think I am bound to take judicial notice of these facts; and they, in my judgment, constitute such an abuse and misuser of the charter in point of law as entitle the Crown to have it declared forfeited, and repealed by *scire facias*.

For these reasons I am of opinion that the Crown is entitled to the judgment of this Court, and that the judgment of the Court of Queen's Bench ought to be affirmed.

Talfourd J.

TALFOURD J. Two principal questions are raised in this case. First: whether the directions in the charter granted to the defendants, that the sum of 50,000*l.* at the least shall be paid up within twelve calendar months, and that the Company shall not begin business until three of the Directors shall have certified to the President of the Board of Trade that one half of the capital

has been subscribed for, and 50,000*l.* at the least paid up, which are alleged to have been disobeyed by the commencement of business by the Corporation before the payment of the stipulated sum, and by a certificate of the Directors certifying, with conscious falsehood, that such payment had been made, are conditions on the breach of which a *scire facias* would lie, if the charter contained no express proviso for its avoidance on such violation. And, secondly: if they are such conditions, whether the right of the Crown, to avoid the charter by the prerogative writ of *scire facias*, is, by virtue of the proviso enabling Her Majesty to revoke the charter by writ under the great seal or sign manual for non-compliance with any of the conditions expressed on it, is suspended until after revocation by such summary proceeding. I think the directions, which have been so violated, *are* conditions in respect of which *scire facias* may be brought in the ordinary way, by a relator with the sanction of the Attorney General's fiat, and that the special power of revocation does not suspend that constitutional remedy; and that, consequently, the present declaration is good without alleging a special revocation by the Crown. The answer in the affirmative to the first of these questions seems scarcely to be disputed by the learned Judges who, in the Court below, expressed opinions favourable to the motion in arrest of judgment: and the elaborate argument of Mr. Justice *Coleridge* proceeds on the concession that the directions are in the nature of conditions, for breach of which in the absence of special provision a *scire facias* might be supported; and, when regard is had to the language of the grant, "*subject to the directions and provisions in Our Royal charter contained,*" and also to the language of the

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proviso relied on by the defendants, purporting that the special power of revocation may be applied to the breach "*of the directions and conditions in the charter contained,*" it seems to be clear that such interpretation is right. If so, the whole case resolves itself into the question whether the special power of summary revocation must be exercised, before a scire facias can be maintained for the breaches alleged in the declaration and found by the jury. This question involves the consideration whether, supposing such intention to be manifested by the proviso, it is a purpose which it is competent for the Crown to effectuate, or whether the attempt would not be beyond the legitimate exercise of the prerogative, involving a partial resignation of powers which are, in truth, protection of the rights of the subject, though having the name of "prerogative," and substituting for the constitutional power so relinquished a novel species of arbitrary discretion. But it is not necessary, in the view I take of the case, to determine whether the maxim, *Non potuerit Rex gratiam facere cum injuriâ et damno aliorum* (3 *Inst.* 236), applies to the discretion supposed to be assumed by the Crown in this charter: it is sufficient for the argument to contend that a new restriction on the ancient remedy by scire facias, beyond that implied in the necessity for the Attorney General's fiat, cannot be implied from doubtful words, but should, at least, be clearly and unequivocally expressed. The conditions which in this case were broken relate to rights and liabilities of public import; conditions directly affecting the rights of parties who might deal with the Company in their corporate capacity, on the faith of their having in hand at the time of their commencing business the subscribed capital of 50,000*l.*, and on the truth of the

certificate, which, being made "sufficient evidence" of the fact certified, directly affects strangers by its falsehood. Can it be implied that the Crown intended to deprive parties who might be seriously aggrieved by such wilful misconduct of their remedy, because it has sought, perhaps inconsistently and ineffectually, to secure to itself a more summary means of redress? In considering the effect of the conduct of the Directors in certifying falsely to the Crown, I regard the commencement of business without a true certificate as a breach of the express condition, not as an independent abuse of the franchise. "To certify" must, I apprehend, mean to certify truly: and therefore I do not found my opinion on the position which, if the charter were silent on the subject of the certificate, I should maintain, that the falsehood of the certificate was in itself an abuse of the franchise, which would work a forfeiture of the charter. It is said that the proviso for revocation will be incapable of effectual operation unless it be construed as rendering the special act of the Crown a condition precedent to the subject's remedy, and that, being bound if possible so to construe the charter as to give effect to every word of it, we ought to read a proviso, apparently subjecting the grantees to a peculiar liability, as extending to them immunity and protection. It is no doubt difficult to find any sensible interpretation for that part of the proviso which enables the Crown to revoke *on conditions*; for this seems almost to amount to a contradiction in terms; but the difficulty will be rather increased than removed by holding that the scire facias is suspended. It may also be difficult to determine what the precise effect of a special revocation by the Crown would be; whether it might or might not be pleaded by

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the subject in a proceeding by the Corporation still assuming to act: but it may well be that those difficulties were not foreseen, and that the object was to give a summary power to the Crown, consistent with the ordinary rules of law and practice, without intending to abolish or suspend the ordinary prerogative remedy. Those difficulties may be met by the suggestion of absurdities which would arise in the enforcement of the special proviso; but, as the difficulties arising from either construction have been fully considered by the Lord Chief Justice of the Court of Common Pleas, whose judgment I have had the advantage of reading, I prefer referring to his arguments, as he will state them, to anticipating them in less appropriate language.

Let it however be assumed that the arguments for the convenience of the construction of the defendants predominate ever so greatly over those which can be suggested for the prosecution: I still hold the conviction that they do not justify that violence to language which the argument for the defendants requires. The rule, that we must, if possible, give effect to all the words of a statute, charter or deed, does not extend to the introduction of words which are not contained in it, so as to change a proposition to its converse. In order to sustain that argument, we must construe the proviso as if, instead of merely empowering the Crown to revoke in certain modes for certain conditions broken, it had run thus: "Provided always and We do hereby will and declare that, *notwithstanding* the said Corporation shall fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period before limited in that behalf, and subject as aforesaid, and *notwithstanding* the said Corporation shall

fail to comply with any other the directions and conditions in these Our letters patent contained, yet these Our letters patent shall remain in full force, vigor and effect, in no manner annulled by any such disobedience, unless We, Our heirs and successors, shall by some writing under the great seal or sign manual revoke and annul this Our royal charter, which it shall be lawful for Us to do, either absolutely or on such terms and conditions as We shall think fit." If the argument for the defendants concedes that without the proviso the scire facias would lie for the conditions broken, it must go the full length of contending that the proviso I have supposed is implied in the proviso of the charter; and I am aware of no authority in which the maxim of construction, requiring effect if possible to be given to every part of a charter or instrument, has ever been held to work such a transformation as this. It is a possible thing that words should be without meaning, or that their meaning should be too deep for judicial acuteness to fathom: but it does not follow that therefore a Court is at liberty to introduce new and different language, in order that something which is not expressed may be reasonably construed.

I therefore think the declaration sufficient without alleging a revocation by the great seal or sign manual; and that the judgment of the Court of Queen's Bench should be affirmed.

WILLIAMS J. The circumstances of this case, and the points on which the decision of it ought to depend, have been so fully and clearly explained in the judgments of the Judges of the Court of Queen's Bench, that I do not propose to make any further statement of

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them. I shall also assume that the directions in the charter in question are in effect conditions, for the breach of which the charter would have been forfeited and this proceeding by scire facias would beyond all controversy be sustainable, supposing the charter did not contain any proviso; because on this point I believe the Judges of this Court are, and always have been, unanimous. The only question which I shall consider is, Whether the ordinary proceedings by scire facias are in any way controlled or qualified by the introduction of the proviso: and I am of opinion that they are not.

It is contended, in support of the writ of error, that they are controlled by the proviso, to this extent, viz. that they are not sustainable at all, either by the Crown itself, or by a subject authorized by the fiat of the Attorney General, unless they have been preceded by a revocation of the charter, under the great seal or the sign manual of the Queen. It is unnecessary to give any opinion whether the Crown has the power, after having deemed it proper to insert a condition in a charter, to superadd a reservation that a breach of that condition shall not be followed by its legal consequences; one of which is that the charter may be repealed in the ordinary course of law by scire facias; it is enough to say that I think such a reservation, if it be legal, cannot be created, unless by express words or necessary implication, and cannot arise on mere surmise or conjecture. Now, it cannot be argued that the charter contains any express reservation of this kind: and therefore the only question is, whether it must necessarily be implied. There are three main grounds on which it has been contended that such necessary implication arises. First: it is contended that the legal maxim "*expressio unius*

est exclusio alterius" (or, as it is sometimes worded, "expressum facit cessare tacitum") applies, for that the express declaration in the proviso, that, in case of non-compliance with the conditions, the Crown may revoke and make void the charter under the great seal or sign manual, excludes every other mode of revocation or annulment; but this maxim of law is by no means of universal or conclusive application. For example: it is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a specific remedy, that remedy must be pursued and no other, yet, where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is *cumulative*, and proceedings may be had either at common law or under the statute. Accordingly, if the intention of the proviso were to give a remedy in addition to that by way of *scire facias*, it is plain that the maxim would be inapplicable, just as in the common case of the proviso for revocation in letters patent for inventions. It is however contended, secondly: that the proviso cannot operate as a remedy in addition to that by way of *scire facias*, and therefore that it cannot operate at all, unless as a condition precedent to that remedy. The proviso, I concede, is so worded that a revocation by writing under the great seal or sign manual of the Queen would be ineffectual per se, notwithstanding the writing affirmed that the Corporation had failed to comply with the conditions, and explicitly stated in what that non-compliance consisted. It would, I admit, be necessary, in order to make the revocation by the Crown operative, to prove the truth of the matters so affirmed and

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alleged. And I will not dispute (though I think the point by no means clear) that the non-compliance with the conditions might be relied on, without a *scire facias*, as a forfeiture, in any action in which the validity of the charter was contested, although such a revocation by the Crown had not taken place, equally as if it had. But I deny it to be a necessary inference, from the fact that the proviso is so framed that it *cannot* operate as an additional remedy, that it was not *intended* so to operate. I cannot believe that it was really meant that the Crown was to enquire and deliberate whether the conditions had been broken, and, after such enquiry and deliberation, to affirm (if it were deemed just to do so) that such a breach had occurred, and to revoke the charter under the great seal, and that afterwards, by reason of a jury not being satisfied that the Sovereign's affirmation was true, that affirmation should be set at nought, and the solemn act of revocation under the great seal be regarded as a nullity. This supposition is so improbable, that I think it justifiable to believe that the real intention was that the act of revocation by the Queen should operate as an additional remedy, though that intention may have been marred in effect by the inconsiderate mode in which the proviso has been penned. The third and remaining argument, in support of the writ of error, is founded on the circumstance that the proviso confers on the Crown authority, in case of a breach of condition, to revoke and make void the charter, either absolutely *or under such terms and conditions* as the Crown shall think fit. And it is contended that the Crown would, in effect, be deprived of this discretion, if the subject might repeal the charter absolutely, by proceeding in *scire facias*, for a breach of

condition of such a venial nature that the Crown might think it fit to revoke only on certain terms and conditions. But it seems to me that such discretion is conferred on the Crown by the proviso in words only, and not in reality. For no other mode of revocation would, as it seems to me, be practicable but an absolute one: I confess that I am unable to understand what is meant by a "revocation on terms and conditions," or in what other mode the charter could be modified than by granting a new one. This obscurity appears to me to afford another proof that the proviso was drawn by some one who had not duly considered the subject of it, and another reason for denying that from the terms of it such reservation as is suggested must necessarily be implied. I may add that such an implication would be in violation of the established general rule that affirmative words shall not have a negative operation. For these reasons I am of opinion that the judgment should be affirmed.

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PLATT B. In this case a writ of scire facias issued for the repeal of letters patent granted by the Crown to *John Melville, Philip Anstruther* and others, authorizing the incorporation of *The Eastern Archipelago Company*. The letters patent were dated the 17th June, in the 11th year of the reign of Queen Victoria, and granted "*subject to the directions and provisions therein contained.*" One of the directions was that the sum of 100,000*l.*, being half the amount of the capital, should be subscribed for within twelve months from the date of the letters patent; another, that the sum of 50,000*l.* should be paid up within the same period; another, that the said partnership should not begin business until it should

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have been certified to the President of the Board of Trade, by at least three of the Directors of the Company, that at least one half of the capital had been subscribed for, and the sum of 50,000*l.* at the least paid up. The letters patent also directed that the grantees and other members for the time being of the Corporation should, within one year from the date of the grant, enter into and execute a proper deed of copartnership and settlement, and lodge a copy of such deed of settlement within the aforesaid period of one year with the Board of Trade. The letters patent also contained the following proviso. "Provided always, and We do hereby will and declare, that, in case the said Corporation shall fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period before limited in that behalf, and subject as aforesaid, *or in case the said Corporation shall not comply with any other the directions and conditions in these Our letters patent contained*, it shall be lawful for Us, Our heirs and successors, by any writing under the great seal or under the sign manual of Us, Our heirs and successors, to revoke or make void this our royal charter, and every clause, matter and thing therein contained, either absolutely, or under such terms and conditions as We or they shall think fit." This proviso was immediately succeeded by the following one. "Provided always that, notwithstanding anything herein contained, it shall be lawful for Us, Our heirs and successors, either under Our great seal or any writing under the sign manual of Us, Our heirs and successors, at any period after the expiration of twenty one years from the date of these presents, to revoke or make void this Our royal charter and every clause matter and thing therein contained, or to add such modifications, conditions and provisions as We or they shall

think fit." The scire facias suggested, amongst other matter, that the sum of 50,000*l.* had not been paid up within twelve calendar months from the date of the letters patent; that, although the said partnership had begun business, yet when the said partnership so began business the sum of 50,000*l.* had not been paid up; that, although the partnership had begun business, it had not been certified to the President of the Board of Trade by at least three of the Directors of the said Company that at least one half of their capital had been subscribed for and the said sum of 50,000*l.* at the least paid up.

The Company in answer to these suggestions averred in the 5th plea that the 50,000*l.* had been paid up within the period of twelve calendar months from the date of the letters patent; in their 10th plea, that at the time the partnership began business the sum of 50,000*l.* had been paid up; in their 12th plea, that when the partnership began business it had been certified to the President of the Board of Trade by three of the Directors of the said Company that at least one half of the capital had been subscribed for and the said sum of 50,000*l.* paid up; and in the 13th plea that at the time of giving the said certificate the sum of 50,000*l.* had been paid up. The rest of the pleadings do not affect the question raised by the writ of error. On the trial, the jury found upon the issues joined on the 5th, 10th and 13th pleas for the Crown, and upon the remaining issues for the plaintiffs in error. And, the Court of Queen's Bench having upon this verdict given judgment for the Crown, two questions only seem to me to arise: First, was the payment up of the 50,000*l.*, within twelve calendar months from the date of the letters patent before the Directors certified to the

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President of the Board of Trade and the Company began business, a condition the non-performance of which would entitle the Crown to revoke its grant? Second, could the Crown issue a scire facias to effect that revocation? With regard to the first question: the letters patent, by stating specifically in the outset that the grant was made subject to the directions and provisions therein contained, and by afterwards reserving a special power of revocation *on the Company's non-compliance with the directions and conditions therein* contained, shew that payment of the 50,000*l.* within the period assigned was a condition the non-performance of which entitled the Crown to revoke the grant. With regard to the second question: it has been insisted that the Crown, by the introduction of the first proviso, had limited its right of cancellation to the two modes therein mentioned. To this I answer: First, that, in the absence of words expressly excluding other modes of cancellation, such a limitation cannot be intended; Secondly, that the Crown could not, in derogation of the right of the public, so limit and fetter the exercise of the prerogative, which is vested in the Crown for the public good. The Crown cannot dispense with any thing in which the subject has an interest; *Thomas v. Waters* (a); nor make a grant in violation of the common law of the land; 2 *Roll. Abr.* 164. *Prerogative le Roy.* (T). Thirdly: that the context shews that the power and remedies reserved by that proviso, if they were capable of being exercised and enforced, were cumulative. Had the letters patent ended where the first proviso begins, the grantees would have derived

(a) *Hardr.* 443, 448.

from it a franchise, unlimited in point of time, but liable to determination by scire facias in the event of an abuse of it, or the non-performance of the conditions on which it had been granted. Seeing therefore that the Crown had, by the ordinary proceedings at law, the means of cancellation on the non-performance of the conditions or abuse of the power granted by the patent, and that the object of the second proviso was to subject the Company to greater controul, I am induced to think that both provisos were conceived with a similar design, and were introduced, not with a view of abridging the rights of the Crown, but to reserve to the Crown a more extensive and summary controul over the Company.

Upon the whole, therefore, I am of opinion that the payment up of the 50,000*l.* within the twelve calendar months and before the Company began business was a condition: that, notwithstanding the first proviso, the remedy by scire facias remained: and that, upon the whole record, the judgment of the Court of Queen's Bench should be affirmed.

CRESSWELL J. (*a*). This charter was granted by the Crown, for the purpose of incorporating certain parties, who then were, or thereafter might become, members of a trading copartnership; and they were thereby made a body politic and corporate, subject to the directions and provisions of that charter. The charter contained, amongst others, directions and provisions that 100,000*l.*, being one half of the capital intended to be raised, should be subscribed for within twelve months from the date of the charter, and 50,000*l.* paid up within that

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(*a*) Alderson B., in the absence of Cresswell J., read this judgment.

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period; that a partnership deed should be executed with clauses providing for the management of the concerns of the Company, the keeping of accounts and preparation of a balance sheet to be produced at their annual meetings; and, further, that the partnership should not commence business until it should have been certified to the President of the Board of Trade, by at least three of the Directors, that 50,000*l.* had been paid up (which of course means that the certificate should be true). Of these directions (which in this charter must be treated as conditions) some appear to have been framed with the object of protecting the shareholders, others for the protection of the public. The clause prohibiting the commencement of business until capital to a certain amount had been paid up is of the latter description, and extremely necessary for that purpose, inasmuch as the creditors of this incorporated copartnership would have no remedy against the members, but against their corporate property only. If, then, the corporation under colour of their charter began to trade before they were authorized so to do, it was an abuse of their charter, which worked a forfeiture, and rendered them liable to have it cancelled by means of a *scire facias*. And this is a matter in which the subject is interested: the abuse of the franchise is to his prejudice; and he, *ex debito justitiæ*, is entitled to a *scire facias* to procure the cancellation of it. Every franchise granted by the Crown is subject to the implied condition that it shall be used according to the grant; and if it be used otherwise the franchise is forfeited. Here the franchise of being a corporation, and trading as a corporation, was to be exercised when a capital of 50,000*l.* had been paid up: without any express condition this would have

been subject to an implied condition that they should not trade otherwise; and their trading as a corporation, when not authorized to do so, would be an abuse of their charter. If the question in this case had rested simply either upon the ordinary consequence of an abuse of the charter, or the breach of the express condition, I am not aware that there would have been any difference of opinion. All would have agreed that the charter was forfeited, and might be repealed by *scire facias*, issued by the Attorney General acting for the Crown, or, by his permission, at the instance of a subject aggrieved. But it is contended that the proviso, introduced afterwards, takes away both from the Crown and the subject the right to proceed in that mode. "Provided always, and We do hereby will and declare, that, in case the said Corporation shall fail to enter into and execute such deed of settlement as aforesaid, and deposit a copy thereof within the period before limited in that behalf, and subject as aforesaid, or in case the said Corporation shall not comply with any other the directions and conditions in these Our letters patent contained, it shall be lawful for Us, Our heirs and successors, by any writing under the great seal or under the sign manual of Us, Our heirs or successors, to revoke and make void this Our royal charter, and every clause, matter and thing therein contained, either absolutely, or under such terms and conditions as We or they shall think fit." It certainly does not in terms take away any right. The proviso affects to confer a power, not to take any away: the words are affirmative only; and, in other instruments as well as in Acts of Parliament, the distinction between the operation of affirmative and negative words is well known. Thus in *Co. Litt.* 115. a. we read:

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(a) 2 B. & C. 197.

the effect of controuling and limiting that which would otherwise exist they must be very plain. Nor can I discover any reason why the Crown should protect the patentees from forfeiture for an abuse of the franchise by an act expressly prohibited, and leave all other abuses liable to be dealt with according to the course of the common law. But it is said that such alteration is necessary in order to give some operation and effect to the proviso. If it had been held to operate so as to enable the Crown to decide, without being liable to question, that the patent is or shall be void, it would have been clearly cumulative, and the two powers might have well stood together: and I am much disposed to think that the framers of the charter intended to confer that power, although they may have failed to accomplish it. But, if the Queen could not decide absolutely and without liability to dispute that the conditions had not been fulfilled, still she might effectually revoke by declaration under the great seal, if a case for revocation within the terms of the proviso had arisen; and a scire facias for that purpose would not be necessary, and any subject might, in any legal proceeding, avail himself of such revocation by proving the breach of condition; and in this case also the proviso would not be inoperative. If this were not so, the clause, instead of giving any new power, would only clog and impede the proceedings of the Crown by rendering the revocation under the great seal necessary as a preliminary proceeding to the issuing of a scire facias. But, on behalf of the plaintiffs in error, it is said to confer a power to revoke "subject to terms and conditions," which is a new power which could not coexist with the common law power. I confess myself unable to discover what is meant by a revocation subject

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to terms and conditions. If it is to be read as "conditional revocation," or in other words that the charter shall be revoked unless certain things are done, that is future only, a threat to revoke and not a revocation; which threat, in the event of a breach of condition, might equally have been used without this clause; and, in such case, is the charter to be void from the time when the great seal is affixed, or at the expiration of the time allowed for fulfilling the terms and conditions? If the latter, is a second instrument under the great seal necessary, or may the Crown by the first revoke in futuro? It may be urged that the expression may have another meaning, viz.: that revocation shall not be followed by the consequences which the common law attaches to a revocation: but that, I apprehend, is a power which the Crown could not assume. Another operation ascribed to this clause is, that the Crown, by it, obtains the sole power of revoking the charter, which would otherwise have belonged to the subject also: but it would, as it seems to me, be a new doctrine to hold that the Crown, merely by reserving to itself certain powers in a grant to one subject, can take away from all other subjects those rights which, by the common law, are in their favour annexed to such grants. If it be said that the Queen might have incorporated the Company for trading purposes without insisting upon any capital being paid up, so that commencing business without capital would be no cause of forfeiture, it seems to me to be a sufficient answer, that the Queen has not done so, and that the power of the Crown to grant a charter, not subject to a certain condition, throws no light upon the question whether a charter granted subject to that condition is forfeited by the breach of it;

nor does it shew that the Queen can grant a patent subject to conditions, and at the same time exempt the patentee from the consequences annexed by the common law to the breach of those conditions. There are two other meanings, which, as it seems to me, may be ascribed to the proviso quite as plausibly as those already mentioned. One is, to hold it applicable to those conditions or directions which relate to the internal affairs of the Company and affect its members, but not the public; and then it would indeed give the Queen a new power to revoke which neither she nor the subject would have enjoyed by the common law. The other is, that she may revoke subject to terms and conditions affecting the property of the Corporation, which upon its dissolution would go to the Crown; a power which she would either have enjoyed without the clause, or which she could not assume by it, a power, moreover, which she might equally exercise if the patent were repealed by *scire facias* issued at the instance of a subject. It is unnecessary to give a decided opinion as to the power of the Crown to grant a charter not subject to the right of the subject to contend that it has been forfeited by breach of a condition, in which he has an interest, and which involves an abuse of the charter; for in my judgment, founded on the reasons above assigned, the words of this charter do not shew that it was intended so to operate. It has been suggested that great injustice may be done if this charter should be held forfeited by reason of some literal, but not substantial, breach of condition: if the breach were of that nature it could hardly be said that the subject is entitled to the *scire facias ex debito justitiæ*. It might be refused by the Attorney General, just as he would be justified

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in the exercise of his judgment in refusing a writ of error in a criminal case; or the proceeding might be stopped by a *nolle prosequi*. All that we can know on this record is that the condition has been broken: and the legal consequences of a breach of condition must follow.

For these reasons I am of opinion that the judgment of the Court below must be affirmed.

Parke B.

PARKE B. The questions in this case, upon which our decision must depend, appear to me to be three.

First: Whether the charter in this case is avoided *solely* by reason of the non-compliance, by the Corporation, with the directions and conditions contained in it, or partly by a matter *dehors* those conditions, and not provided for by them: for, if it be for matter *dehors* the conditions, in whole or in part, this proceeding by *scire facias* is certainly right. Secondly, whether, if it be avoided solely for non-compliance with those terms and conditions, the signification of Her Majesty's pleasure by writing under the great seal or under the sign manual is a necessary step to the avoidance of the charter in case of a breach? And, thirdly, if it be so, whether the Crown had power by law to annex such a superadded condition in its charter. The second question depends entirely upon the true construction to be given to the terms of the charter itself, and is, I think, the material question in the case.

I am of opinion, first, that this proceeding, to revoke the charter, is solely for breaches of the directions and conditions contained in it, and not for matter *dehors* the charter, and, secondly, that, according to the true construction of the charter, a writing under the great

seal or the sign manual was a necessary step to the avoidance of the charter, and, thirdly, that the Crown could if it so pleased impose a superadded condition to the breach of express conditions in a charter, that, if the special directions of the charter should not be complied with *and* the Crown should signify its pleasure by writing under the great seal or sign manual, the charter then, and then only, should be void.

As to the first point, viz. whether this proceeding is for the violation of the directions and conditions of the charter, the three issues found for the Crown, upon which the judgment for the Crown proceeded, are: first, that the sum of 50,000*l.* of the capital of the Corporation was not paid up within *twelve calendar months* from the date of the letters patent; secondly, that, at the time the *partnership began business*, 50,000*l.* of the capital had not been paid up; and, thirdly, that, at the time of the certificate given by three of the Directors of the Company that 50,000*l.* at least of the capital had been paid up (which certificate was a condition precedent to the permission to begin business), that sum had not been paid up.

Now all these three are violations of the express directions and conditions of the charter, or of a condition which is to be necessarily implied from them, and would have been no causes of forfeiture if the express conditions had not been inserted. The first is for a direct breach of an express direction or condition contained in the charter, viz. the payment of 50,000*l.* in twelve calendar months; the two last for breaches of a direction or condition implied in the condition or direction, that the Company shall not begin business, until it shall have been *certified* to the President of the Board

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of Trade, by three Directors, that 50,000*l.* of the capital had been paid up; it is surely to be necessarily implied in such a direction or condition, that the certificate is a *true one*, and the non-payment of the 50,000*l.* at the time of the certificate, and at the time of beginning business, are breaches of the direction or condition not to begin business till after such certificate. If the charter had been obtained by a false suggestion, or a fraudulent concealment, or a fraudulent representation of facts, the Crown would have been deceived, and the charter would have been void at common law; and so it would have been if it had been injurious to the vested interests of other subjects (*Rex v. Sir Oliver Butler (a)*), and so improvidently issued, and this at common law, quite independently of any directions or conditions contained in it; and a scire facias would unquestionably have been the proper mode of proceeding, and a legal incident to try the question of the validity of the charter. So it would if the charter had been forfeited by a neglect or abuse; that being a breach of implied conditions, on which the charter was granted, irrespective of those expressly named in the charter. Nor is it necessary to question the proposition contended for by Mr. *Willes*, that in such cases the scire facias, being a legal incident, cannot be taken away, or at all events not without express words. That principle would not apply, if the Crown really intended to make the signification of the royal pleasure an additional condition to the avoidance of the charter for breaches of express conditions, and had power by law so to do. In all the cases above supposed, the charter would have been void, whether

(a) 3 *Lev.* 220.

the express conditions, the breaches of which have been found by the jury, had been violated or not; but in the present case the fraud on the Crown by giving a false certificate avoided the charter, not on the ground of false suggestion, or as being a matter irrespective of the express conditions, but simply because it was substantially a breach of one of the express conditions or directions in the charter itself, which by its terms makes such breach an avoidance. If these conditions or directions had not been introduced into the charter, the false certificate would have been no cause of forfeiture at all.

I am therefore clearly of opinion that the charter is not forfeited in this case by matters dehors the express terms of the charter. And the only questions then are: Whether, on the true construction of it, it can be avoided for any breach of condition or disobedience of directions contained in it, except upon signification of the royal pleasure by writing under the great seal or sign manual? and Whether it was competent for the Crown to super-add that condition?

I am of opinion in favour of the plaintiffs in error upon both points. The charter contains several directions (not termed conditions, but nothing turns on this expression), that 100,000*l.* should be subscribed for in twelve calendar months, and 50,000*l.* at least paid up in that period: that the members shall execute a proper deed of settlement, in which shall be contained certain provisions with a proviso for dissolution when three fourths of the capital has been lost: that the deed of settlement shall be prepared to the satisfaction of the President of the Board of Trade, and a copy deposited: that the partnership shall not begin business until it shall have been certified to the President of the Board of

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Trade by at least three Directors that half the capital has been subscribed and 50,000*l.* at least paid up; such certificate to be endorsed on the charter, and to be sufficient evidence for the purpose of the aforesaid provision (meaning, I suppose, of compliance with it). Then soon after follows a provision, which I will afterwards state, and then a declaration that when the Corporation shall have been dissolved in pursuance of the deed, and all debts discharged, the charter should be absolutely void, clearly shewing that the charter distinguishes between conditional avoidance and an absolute one. Then follow directions, that the deed shall be enrolled in a year, any supplemental deed and bye laws in six months from the making, and a direction and declaration that the royal charter is granted upon this express condition, that the Corporation shall abide by and conform to all and every the directions which may be given to it by a Secretary of State as regards its intercourse and dealings with any foreign state or power. The proviso is set out in the writ as follows: "Provided always, and We did thereby will and declare, that, in case the said Corporation should fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period before limited in that behalf, and subject as aforesaid; or in case the said Corporation should not comply with any other the directions and conditions in Our said letters patent contained; it should be lawful for Us, Our heirs and successors, by any writing under the great seal or under the sign manual of Us, Our heirs or successors, to revoke and make void Our said royal charter, and every clause, matter and thing contained, either absolutely, or under such terms and conditions as We or they should think fit." If there had not been such a proviso, and the Company had

disobeyed any of these directions, such disobedience would have forfeited the charter; and the proper mode of avoiding it would have been by the only proceeding known to the common law, a *scire facias* in the name of the Crown, in which proceeding the fact of the forfeiture and its sufficiency in point of law are tried, and the letters patent are revoked and cancelled by the judgment of the Court. But the introduction of the proviso creates the difficulty. What is its meaning? Is it to give an *additional* remedy to that which the common law provides, as is contended by the defendant in error, or to provide the only remedy, or rather to annex an additional condition to the common law remedy (for the effect of the instrument under the great seal or sign manual cannot have the immediate effect of cancelling the charter; and a *scire facias* is the only way of effecting that)? And is it equivalent to saying that the charter shall not be revoked for breach of the express directions unless the Sovereign indicate his pleasure by writing under the great seal or by the sign manual? which is the contest on the part of the plaintiffs in error. I think the view of the plaintiffs in error is correct. This proviso is the only clause in the charter which provides for the steps to be taken in case of a failure to comply with the directions and conditions in the charter contained; it is silent as to any other way: and that silence, I admit, would not *necessarily* exclude the remedy given by the common law (see an instance in the case of *Sharp v. Warren*(a)): but the remedy given by this charter, if the clause is treated as giving a remedy, is inconsistent with the existence of the remedy at the common law. Every

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subject injured by the violation of the charter is entitled to the remedy by *scire facias* at common law; for *scire facias* is to be allowed "*ex debito justitiæ*." This is expressly laid down in *Sir Oliver Butler's Case* (a), *Regina v. Aires* (b). The meaning of that expression is, that he is entitled to it if justice requires it, not as a matter of course on the one hand, or as a matter of favour on the other. The Attorney General, who exercises the power of the Crown in this respect, has no option; he simply decides the question of a *primâ facie* right. We cannot suppose that the Crown meant this right to be continued, since it is inconsistent with the special power reserved to the Crown, and cannot exist at the same time. The clause therefore, though in affirmative words, is an implied negative. If the *scire facias* is pursued to a successful result the charter must be absolutely cancelled. That is the judgment of the Court; and it can impose no conditions. But this proviso gives the power to the Crown to revoke in case of non-compliance by writing under the great seal or under the sign manual, either absolutely or *under such terms and conditions* as the Crown shall think fit. The Crown clearly means to reserve to itself, not the power of determining whether there has been a breach or not in point of fact on the part of the Company, for that must be proved as a matter of fact, but whether, in case there has been such a breach, it would be fit to avoid the charter altogether, or only upon terms and conditions; as, for instance, though the charter were forfeited by the deed of settlement not being executed, or the copy not deposited, or the capital not subscribed, or the capital not paid up, or any

(a) 2 Ventr. 344.

(b) 10 Mod. 354.

other direction not complied with in the prescribed time, yet it should not be void if those directions were complied with in an extended period, and the discretion of the Crown would have to be exercised according to the nature of the breach, its magnitude and consequences: all of which the Crown, through its responsible advisers, would have duly to determine, and then the determination of the Crown would have to be expressed in the precise mode provided for by the charter. How is this option of absolute or conditional revocation of the charter to co-exist with the right of the subject, as a matter of strict justice, to have the grant repealed in case of forfeiture absolutely and without condition, by a writ from Chancery? It appears to me that the two modes of proceeding are inconsistent, that the Crown would be deprived of its election to make a conditional revocation if the subject could cause the charter to be revoked as a matter of right, and, consequently, that in this case the affirmative provision clearly implies a negative of the absolute common law right of repeal.

If then it be a condition annexed to the repeal of the charter for the breach of the express conditions, that the royal pleasure shall be indicated in the mode prescribed, the *scire facias* is bad in this case, for not stating that it was so indicated. It would not be valid though the Attorney General actually did what it is suggested in some of the judgments in the Queen's Bench he must be supposed to have done, considered, as the adviser of the Crown, the propriety of revoking the grant absolutely or with conditions, under all the circumstances. It seems to me that such a supposition is a very improbable one, because it is quite at variance with the authorities above cited that the

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scire facias issues "ex debito justitiæ;" in which case the justice alone of issuing the scire facias is to be decided by the Attorney General, and nothing else. Another reason and a strong one, in my mind, for believing that the Crown did not intend by this proviso to give an *additional* or *cumulative* remedy for the repeal of the charter is that it could not possibly operate as such a *remedy*. As an additional remedy it would be perfectly nugatory; as a condition to the ordinary remedy it would be operative. The option of the Crown to repeal the charter by writing under the great seal or sign manual would not operate *at all*, unless there had been a breach *in fact*; and whether there had been a jury would still have to determine. In any proceeding by the Company against a subject he could not defeat the charter by simply producing the writing or sign manual; he would have still to prove that there had been a breach of the conditions or directions of the charter. He would therefore gain nothing in this respect by making use of the supposed cumulative remedy; and, further, no judgment of revocation and cancellation of the letters patent could be pronounced in this proceeding, as it could upon a scire facias, either by the Court of Queen's Bench or the Court of Chancery. So that *as* an additional and cumulative remedy this condition of the charter would be valueless, and might be struck out of the charter altogether.

It is however suggested that it might be advantageous as a cumulative remedy, because, although it were necessary to prove a breach before the revocation by sign manual should be available, as well as in a proceeding by scire facias, the fact that a breach had been committed of the express conditions could not be *pleaded*

in an action in which the validity of the charter came in question, and that advantage could only be taken of a forfeiture at common law by a *scire facias*, and therefore this provision by sign manual &c. instead of the latter might enable a party to plead the breach in such an action, and so be a less expensive mode of taking advantage of the breach, and consequently the option to have recourse to it might be advantageous to the subject. But, although a forfeiture by breach of *implied* conditions, such as that of a franchise by nonuser or misuser, a ferry for instance by neglect to have proper boats, could not be taken advantage of by plea in an action by the owner of the franchise but only as a ground of repeal by *scire facias*, I think that doctrine does not apply to a charter, where there is an *express* condition avoiding it in a certain event. The ordinary case of a patent, avoided by non-compliance with the condition to enrol the specification, is an instance of every day occurrence, and never has been disputed; and all the cases which I can discover, after some research, in which a *scire facias* has been held necessary, are cases of breaches, not of express, but implied conditions. That a grant by the Crown may be avoided by concealment in the recital in an action by the grantee against a third person appears by the case of *Alcock v. Cooke* (a). I think therefore that the clause in question is inoperative if treated as giving an additional remedy; and it is therefore the more reasonable to conclude, in construing the charter, that this clause was meant to have some operation, and that the object of the Crown in inserting it, and the Company in accepting it, was that the Crown should exercise a discretion, even if the charter was broken, to revoke or not, or to revoke

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absolutely or conditionally; and consequently that the pleasure of the Crown indicated by a writing under the great seal or sign manual should be a condition to the avoidance of the charter; so that, to have the charter recalled and cancelled, the prosecutor would have to allege and prove a breach, and the exercise of the royal pleasure, in the mode prescribed, that on that breach the charter should be revoked. I would add that, one of the conditions of the charter being purely a matter of state, viz. the condition that the Company should comply with all the directions given by a Secretary of State as regards their intercourse and dealings with foreign powers, it seems to be peculiarly reasonable that the Crown should, in respect of that breach of condition, reserve to itself a discretionary power, to avoid the charter or not. The proviso inserted in letters patent for new inventions, but rarely acted upon, has been assimilated to this proviso in the reported judgment of my Lord *Campbell* (a). The proviso is: "Provided always, and these Our letters patent are and shall be upon this condition, that, if at any time during the said term hereby granted it shall be made appear to Us, Our heirs or successors, or any six or more of Our or their Privy Council, that this Our grant is contrary to law, or prejudicial or inconvenient to Our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof, in that part of Our United Kingdom of *Great Britain* called *England*, Our dominion of *Wales* and town of *Berwick upon Tweed*, &c., or not invented or found out by" the patentee, "then, upon signification or declaration thereof, to be made by Us, Our heirs or successors, under Our or their signet or

(a) 1 E. & B 356.

privy seal, or by the Lords and others of Our or their Privy Council, or any six or more of them under their hands, these Our letters patent shall forthwith cease, determine and be utterly void, to all intents and purposes, anything hereinbefore contained to the contrary in any wise notwithstanding." The marked distinction between that proviso and the proviso now in question is that in that the decision of the Queen, or the Lords of the Privy Council, *is conclusive* as to the want of novelty or that the patentee was not the first inventor. The patent may be avoided by a defendant in any action upon it by proving the declaration under the privy seal, or that of the Lords of the Privy Council, and no more, without entering into the inquiry of the novelty or the fact of being first inventor; so that the mode of revocation in that proviso mentioned *is* an additional or cumulative remedy, though not so effective as a *scire facias*, simply because it cannot be immediately followed by a judgment of revocation and cancellation. But still it is a *remedy*, whereas the proviso in this case makes the act of the Sovereign nothing, leaves the subject just as he was, literally gives no *remedy* whatever, but as a remedy is entirely useless.

For these reasons I am of opinion that the proviso in question, upon the reasonable interpretation of the charter, makes the signification of the Queen's pleasure a condition or step towards the avoidance of the charter, and consequently that the declaration in *scire facias* in this case is bad for want of the proper averment of the compliance with that condition.

It remains to consider the third question, whether, supposing that this was the true construction of the charter, it was competent for the Crown to superadd the

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condition of the signification of its pleasure by a writing under the great seal or the sign manual, or such additional condition was illegal and void. I think it was in the power of the Crown to do so, and that the condition was legal. The Crown might beyond all question have granted a charter of incorporation to a Company to trade, without imposing the condition of having any capital, or any part of its capital paid up in a given time. Whether it would be a wise measure to do so, is another question; but that it would have been a legal one, cannot be doubted. What can hinder the Crown therefore from imposing such a condition, but reserving to itself the power of deciding whether it ought to be enforced according to the circumstances? The deficiency of the required capital might be a few pounds; the part to be paid up might have been by accident delayed for a day beyond the time limited; the deed of settlement, or a copy of it, might by accident also have been deferred for a short interval. What could be more reasonable than for the Crown to decide whether such a condition of forfeiture ought to be enforced or not in each particular case? It by no means follows that such a clause is in restraint of the prerogative, which is given for the benefit of the subject, but the contrary. I must own I should not have felt any doubt as to this part of the case were it not for the opinions I have heard: and I think that the Crown had full power to reserve its right to avoid the charter or not, just as much as to reserve an absolute power of revocation at its will and pleasure, as it has done, at the end of twenty one years, and just as much as the ordinary clause in a patent giving a judicial power to the Crown to decide whether it was a new invention or not.

I am therefore of opinion that the plaintiff in error is entitled to our judgment, and that the judgment ought to be reversed.

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POLLOCK C. B. I agree with the majority of the Court that the judgment of the Queen's Bench ought to be affirmed. The general facts of the case and the terms of the charter have been already more than once so fully alluded to that it is unnecessary for me to repeat them. I have only to state shortly my reasons for agreeing with the majority of the Court in affirming the judgment. The charter contains an express direction that the partnership shall not begin business until the happening of a certain event, namely, until it shall have been certified to the President of the Board of Trade by, at least, three of the Directors that one half, at least, of the capital has been subscribed and 50,000*l.* paid up, such certificate to be endorsed on the charter and to be sufficient evidence for the purposes of the aforesaid provision in that behalf. For the reasons given by my brother *Wightman* in the Court below (*a*), I am of opinion that this was a condition: and it is admitted on all hands that, if this be a condition, it has been broken; and therefore with the Attorney General's fiat any subject of the realm may proceed by scire facias to question the validity of the charter, with a view to obtain the judgment, that the letters patent shall be cancelled. But it is contended that, although this is a course that might have been adopted in an ordinary charter, not containing any proviso specially framed to meet a breach of condition, or a non-compliance with

(*a*) 1 *E. & B.* 327.

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the directions of the charter, yet that in this particular instance, there being a proviso that (in case of non-compliance with any of the directions or conditions of the charter) it should be lawful for the Crown, by any writing under the great seal or under the sign manual, to revoke or make void the charter, that the proviso alone can be resorted to; and that the present proceedings under this scire facias, being founded, not on *that* proviso, but on what is assumed to be the general rule of law, independent of such proviso, are void, and our judgment ought therefore to be given for the plaintiffs in error. I think this cannot be successfully contended, and for two reasons. First: I am of opinion that any such proviso in a grant or charter from the Crown is to be construed, not as restraining what would otherwise have been the power of the Crown or the right of the subject, but as adding thereto and being a cumulative remedy in the event of a breach of or non-compliance with the directions and conditions of the charter, and not as abridging the power of the Crown if it would otherwise have existed. It is clearly laid down, in 2 *Blac. Com.* 347, that "a grant made by the King, at the suit of the grantee, shall be taken most beneficially for the King, and against the party:" that learned writer points out the distinction between a grant by the Crown and a grant by the subject; "whereas," he says, "the grant to a subject is construed most strongly against the grantor." This rule I apprehend to be clear and plain; and it is abundantly supported by all the old authorities found in every branch of the law. This rule appears to me to exclude the application of either of these two phrases "*expressum facit cessare tacitum*," or "*expressio unius est*

exclusio alterius." That which the Crown has not granted by express, clear and unambiguous terms the subject has no right to claim under a grant or charter. I quite agree with my brother *Williams* that a negative cannot be implied from a positive clause in the charter; nor can it be inferred unless by express terms contained in the charter or by some terms that make it impossible to put any other construction upon it. If then it be conceded, as I think it must be, that without this proviso the charter might have been repealed for breach of the condition, I think the proviso is to be considered as a further and additional power to the Crown to revoke the charter in a particular manner. But, secondly: it appears to me that it may reasonably be doubted whether the Crown can grant a charter that shall not be subject to forfeiture on breach of conditions; and, as far as it is necessary to form any opinion upon that subject, I am inclined to think that it cannot. The public has so much interest in the correct conduct of those who enjoy any chartered rights, that it may well be contended that the power of the subject to question whether or not the charter be legal, or whether the charter has been forfeited by a breach of the condition, cannot be taken away even by the Crown. And supposing this to be doubtful, and supposing it not to be so clear a maxim of law as I am disposed to take it to be, that the Crown cannot grant a charter which shall not be questioned by the rest of the public, in the manner here adopted, by scire facias suggesting the forfeiture of the charter for the breach of a condition, it is a most forcible reason for so construing the charter as to leave the prosecutors a right, which they otherwise would have had, to raise the question in the manner in which they have raised it.

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 the condition has been broken ; and I think any one of
 Her Majesty's subjects, having the Attorney General's
 fiat, has a right by scire facias to bring the matter into
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 on those facts, and the true construction of the charter
 itself, I am of opinion the Crown is entitled to our
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 argued in this case, upon all of which, in my opinion,
 the judgment ought to be affirmed.

Assuming that the proviso operates as a qualification
 of the conditions, it has been argued that the Company
 have abused their franchise, and that, therefore, the
 scire facias well lies. The record shews that 50,000*l*.
 had not been paid up before the Company began to
 trade, and, further, that, when they began to trade, it
 had been falsely and untruly certified to the President
 of the Board of Trade, by the Directors of the Company,
 that the sum of 50,000*l*. had been paid up. It appears
 therefore on the record, not only that the Company
 were guilty of a breach of one of the express conditions
 of the charter, for which, by the admission of counsel,
 a scire facias would lie, if the Queen had thought fit to
 revoke the charter in the first instance by writing under
 the great seal or sign manual, but, also, that the Company,
 availing themselves of their corporate character, made a
 false representation to Her Majesty, through the Presi-
 dent of the Board of Trade. It is said that the certificate
 being false is in legal effect no certificate, and that
 therefore the Company began to trade without the
 necessary paid up capital, and also without a certificate

that it was paid up. I agree that the falsehood vitiates the certificate; but, in my opinion, it has another and more serious effect upon the charter itself. It is a falsehood stated to the Crown by the Directors, in their corporate capacity, professing to act under the charter, and therefore an abuse of their franchise. Assuming that, for a breach of the conditions or any of them, a revocation under the great seal or sign manual was a condition precedent to a *scire facias*, for this breach of duty no such preliminary step could be taken; it is not provided for expressly by the charter, but it is implied, that when the Directors certify they will certify truly: and, in my opinion, if, availing themselves of their corporate capacity, and professing to act under their charter, they certify falsely to the Crown, through its officers, they abuse the franchise by which they are created, and are liable to a *scire facias* to repeal their patent upon that ground. Upon the second point also I am of opinion that the judgment ought to be affirmed. It is mainly a question of construction subject to certain considerations applicable to the prerogative, and well known to those who are familiar with that subject. I take it for granted that, if the proviso was not in the grant, the directions or conditions which it contains would be conditions, for the breach of any one of which a *scire facias* would lie. This is too clear to admit of argument, and indeed was not disputed at the bar, where it was contended, not that the directions per se were not conditions for the breach of which a *scire facias* would lie, but that the proviso was in effect tacked on to each condition, so that, although it was admitted that the breach of each condition was ground for a *scire facias*, it was said that the proceeding could only be taken

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where it was authorized by the Crown by writing under the great seal or sign manual. Before we consider whether this can be the true construction of the charter, let us endeavour to ascertain what the proviso itself means, and what, under any circumstances, can be the effect of it. The proviso contemplates four courses; an absolute revocation of the charter by writing under the great seal or sign manual for a non-compliance with any of the directions or conditions contained in the letters patent; a revocation under such terms and conditions as the Crown may think fit by the same means and for the same causes; an absolute revocation under the great seal or by writing under the sign manual after the expiration of twenty one years; and the addition to the charter after the same period of such modification conditions and provisions as the Crown may think fit. The first part of this proviso raises the question now under discussion; the other parts may usefully be referred to to expound the first. Now, if it be true that the Crown by its prerogative, or a subject using the prerogative upon the fiat of the Attorney General might have repealed the patent by scire facias for breach of the conditions, if the proviso had not been there, it is impossible to suppose that it was intended to control the right of the Crown by superadding a condition, and, at the same time, to leave the privilege of the subject unfettered and uncontrolled. It is therefore argued, on the one side that the proviso was intended to give the Crown an absolute power of revocation or modification under circumstances, without the expense and dilatory process of a scire facias, and on the other that it was meant to limit and restrict the undoubted right of the Crown, and of a party grieved, to use

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prerogative, upon the fiat of the Attorney General, to repeal a charter which may operate to his prejudice. There are difficulties in the way of each of these constructions: but I am of opinion that by the proviso it was intended, not to fetter the prerogative of the Crown, or the right of the subject, but to give a cumulative and additional remedy to the Crown, although I doubt whether, from the manner in which the proviso is worded, it can legally have that effect. If aptly given, there may perhaps be no legal objection to the existence of this cumulative or additional remedy; for, so long as the rights of the subject are not interfered with, the grantee may perhaps make what bargain he pleases with the Crown. I say "perhaps;" because I doubt whether under any circumstances a charter under the great seal can be revoked by writing under the sign manual; and I see many constitutional reasons which might be urged against the existence of such a power uncontrolled in the Crown. These questions however do not arise in this case. It is because this additional power is not properly conferred by apt words that the difficulty arises. The first and most important rule of construction requires that we should give to words their natural meaning; and certainly an unlearned reader would suppose, where the grantor and grantee made a bargain that the former might revoke a charter by writing under the great seal or sign manual for the breach of any of the conditions mentioned therein, that the mere exercise of that power would destroy the charter. But this is not the legal effect of the proviso. The power can only be exercised for the breach of any of the conditions; and, as no mode of ascertaining in the first instance whether such breach has been com-

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where it was authorized by the Crown by writing under the great seal or sign manual. Before we consider whether this can be the true construction of the charter, let us endeavour to ascertain what the proviso itself means, and what, under any circumstances, can be the effect of it. The proviso contemplates four courses; an absolute revocation of the charter by writing under the great seal or sign manual for a non-compliance with any of the directions or conditions contained in the letters patent; a revocation under such terms and conditions as the Crown may think fit by the same means and for the same causes; an absolute revocation under the great seal or by writing under the sign manual after the expiration of twenty one years; and the addition to the charter after the same period of such modifications, conditions and provisions as the Crown may think fit. The first part of this proviso raises the question now under discussion; the other parts may usefully be referred to to expound the first. Now, if it be true that the Crown by its prerogative, or a subject using the prerogative upon the fiat of the Attorney General, might have repealed the patent by *scire facias* for a breach of the conditions, if the proviso had not been there, it is impossible to suppose that it was intended to control the right of the Crown by superadding a condition, and, at the same time, to leave the privilege of the subject unfettered and uncontrolled. It is therefore argued, on the one side that the proviso was intended to give the Crown an absolute power of revocation or modification under circumstances, without the expensive and dilatory process of a *scire facias*, and on the other that it was meant to limit and restrict the undoubted right of the Crown, and of a party grieved, to use the

prerogative, upon the fiat of the Attorney General, to repeal a charter which may operate to his prejudice. There are difficulties in the way of each of these constructions: but I am of opinion that by the proviso it was intended, not to fetter the prerogative of the Crown, or the right of the subject, but to give a cumulative and additional remedy to the Crown, although I doubt whether, from the manner in which the proviso is worded, it can legally have that effect. If aptly given, there may perhaps be no legal objection to the existence of this cumulative or additional remedy; for, so long as the rights of the subject are not interfered with, the grantee may perhaps make what bargain he pleases with the Crown. I say "perhaps;" because I doubt whether under any circumstances a charter under the great seal can be revoked by writing under the sign manual; and I see many constitutional reasons which might be urged against the existence of such a power uncontrolled in the Crown. These questions however do not arise in this case. It is because this additional power is not properly conferred by apt words that the difficulty arises. The first and most important rule of construction requires that we should give to words their natural meaning; and certainly an unlearned reader would suppose, where the grantor and grantee made a bargain that the former might revoke a charter by writing under the great seal or sign manual for the breach of any of the conditions mentioned therein, that the mere exercise of that power would destroy the charter. But this is not the legal effect of the proviso. The power can only be exercised for the breach of any of the conditions; and, as no mode of ascertaining in the first instance whether such breach has been com-

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mitted is provided for by the charter, or exists at common law, if the Crown were, in the most solemn form, under the great seal, to declare that the conditions had been broken, and were to revoke the charter upon that ground, this would be but the commencement of legal proceedings; for the Company might deny the breach of the conditions, and a scire facias would be necessary before the charter could be cancelled. It is said, therefore, that as an additional remedy this clause is useless, and could not have been inserted with that view. Because it will not effectuate that for which it was designed, it does not necessarily follow that it should be perverted from its original meaning. The proviso itself shews the danger of adopting such a rule of construction. Of the four courses pointed out three are useless or impossible. The first is both useless and impossible, as I have already shewn; the second is impossible, because when the charter is revoked no terms can be added (the words being "revoke upon terms," not "threaten" or "offer" to revoke "unless certain terms are complied with"); and the last is also impossible, because, although the Crown and the grantees might, perhaps, saving the rights of the public, make what bargain they pleased between themselves, the Crown could at no time add to the charter so as to incorporate the modifications, conditions or provisions therewith, but must grant a new and supplemental charter for that purpose, having relation only to the time when the great seal was affixed to that charter, and subject to the same rules, applicable to all other charters, as if this branch of the proviso had not existed. In truth, the draftsman who prepared this instrument does not appear to have been familiar with the subject which he had in hand: and the ambiguity of

the proviso seems, in the hurry of business, to have escaped the vigilance of the Crown officers. But, although it is difficult to give to the first part of the proviso the plain meaning, which I believe was intended when the instrument was framed, there are far greater difficulties in the way of the other construction. In the first place, it is (contrary to the well known rule) to give to affirmative words a negative operation, and to hold that language, which professes to confer an additional authority, is in effect a limitation upon a power which is otherwise uncontrolled. Again, in my opinion, it never could have been intended, and would be highly unbecoming, to refer to a jury a fact affirmed by the Crown under the great seal, and to allow a jury to say that the conditions had not been broken, after the Crown had solemnly asserted under the great seal that they had. Take for instance the last condition. The Company are to abide by and conform to all and every the directions which may be given to them by any one of the Secretaries of State, as regards their intercourse or dealings with any foreign state or power. Suppose the Company to have committed a breach of this condition, so as, in the opinion of the Government, to have endangered the friendly relations between this country and a foreign state: is such a question to be determined by a jury? If the construction contended for is right, a mere question of political government would be determined by a jury, and a Court of law would sit in appeal from the decision of the Queen's Government. But there are rules, applicable to the construction of Crown grants, which satisfy me that this construction is not correct. To say the least of it, the proviso is doubtful; and, if it be doubtful, it must be

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construed against the grantee. Where nothing would pass by a construction against the grantee, a charter is construed liberally in his favour, because it is not consistent with the honour of the Crown to suppose a grant with the intention of passing nothing; but where, as in this case, the franchise is perfect, and the question is whether the prerogative is to be restrained, a contrary rule prevails, and the construction is against the grantee, because the prerogative of the Crown is in truth the privilege of the subject, and it is not to be presumed from doubtful expressions that the Crown, when granting a privilege to one subject, intended to interfere with the rights of others. For these reasons I am of opinion that the proviso was intended to confer a cumulative and additional power upon the Crown, and was not intended to restrict the prerogative of the Crown, or to interfere with the privileges of the subject.

But there is a higher ground upon which in my opinion the judgment ought to be affirmed. If the proviso fetters the free exercise of the prerogative, and takes away the right of a party grieved to a *scire facias* upon the fiat of the Attorney General, in my opinion, it is illegal, and therefore void. To every Crown grant there is annexed by the common law an implied condition that it may be repealed by *scire facias* by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney General: and, although this privilege is not enforceable by *mandamus*, it is so much of common right that in no case has it been refused, to my knowledge. Indeed, in the somewhat analogous case of a petition of right, it has of late years been the practice at the Home Office, under great authority, to endorse "let right be done" as a matter

of course, without even referring the case to the Attorney General. This use of the prerogative by the subject is his protection against the abuse of the prerogative to his prejudice, and, in my judgment, cannot be abridged. I know that the Crown might have granted this charter without embodying therein the conditions referred to; but this could only be done upon the responsibility of the advisers of the Crown. We must assume that these advisers deemed the conditions necessary for the public good; and, having inserted them, they cannot say that the legal consequences shall not follow their insertion. For these reasons I am of opinion that the judgment should be affirmed.

Judgment affirmed.

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AARON CLULOW HOWARD, appellant, *against*
JOSEPH REMER and ISAAC LUCAS, respondents.

Tuesday,
November 15th.

THIS was an appeal from the county court of *Cheshire* holden at *Congleton*. The case, as stated by the judge of the county court, raised several points: but

The lessee of
a tithe com-
mutation
rent charge
having dis-
trained on an
occupier, the

occupier gave notice of action, as under stat. 5 & 6 Vict. c. 54. s. 19., "for entering upon my premises at" &c., "on the 11th day of *March* instant, and then and there seizing three in-calf heifers belonging to me, and continuing in my said premises for several days; and also for that you, against my will and consent, on the 17th day of *March* instant, did, at" &c. "aforesaid, then and there seize, sell, drive away and remove from my said premises at" &c. "aforesaid three heifers belonging to me."

The action was brought in the county court; and the following (among other) particulars of demand were stated. "1. For unlawfully entering plaintiff's premises, and continuing thereon, and seizing and distraining three cattle of the plaintiff, under colour of a distress. 2. For unlawfully selling three other cattle of the plaintiff's, not distrained." "4. For continuing on plaintiff's premises, and proceeding to sell the plaintiff's cattle, after an abandonment of the distress."

Held that evidence might be given of the 4th particular: For that, if any notice was necessary of the cause of action referred to in the 4th particular (and, per Lord Campbell C. J., *Coleridge* and *Crompton* Js., *semble* that it was not), the notice given comprehended such cause.

1853. the following parts of the statement only are material to the decision pronounced by this Court.

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The action was brought, by the appellant against the respondents, to recover 50*l.* from the defendants. "The causes of action, as stated in the particulars of demand annexed to the summons, were as follows.

"This action is brought to recover the sum of 50*l.* from the defendants, as and for damages for entering and continuing on plaintiff's premises at *Brereton*, and seizing, taking, converting and selling three cattle of the plaintiff's, on or about the 11th day of *March* last, under colour of a distress for a rent charge: and the plaintiff will seek to recover such damages on the following (amongst other) grounds.

"1. For unlawfully entering plaintiff's premises, and continuing thereon, and seizing and distraining three cattle of the plaintiff, under colour of a distress.

"2. For unlawfully selling three other cattle of the plaintiff's, not distrained."

3. Not now material.

"4. For continuing on plaintiff's premises, and proceeding to sell the plaintiff's cattle, after an abandonment of the distress."

5. and 6. For irregularities in the distress, not now material.

"The plaintiff will seek to recover the damages on the above grounds, and also on the grounds that the distress was illegal, irregular and excessive in other respects. Dated this 31st day of *May* 1853."

The trial took place before the judge of the county court and a jury. The following notice, in conformity with stat. 5 & 6 *Vict. c. 54. s. 19.*, was proved to have been served on both the defendants more than ten days before the commencement of the action.

"To" &c. (the two defendants).

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"I, the undersigned, *Aaron Clulow Howard*, of *Brereton Hall* in the county of *Chester*, do hereby give you, and each of you, notice (according to the form of the statute in such case made and provided) that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a plaint to be levied and entered against you in, and issue a summons thereon against you out of, the county court of *Cheshire*, at *Congleton*, for entering upon my premises at *Brereton* aforesaid, on the 11th day of *March* instant, and then and there seizing three in-calf heifers belonging to me, and continuing in my said premises for several days: and also for that you, against my will and consent, on the 17th day of *March* instant, did, at *Brereton* aforesaid, then and there seize, sell, drive away and remove from my said premises at *Brereton* aforesaid three heifers, belonging to me: whereby I have sustained damage to the amount of 50*l*. As witness my hand, this 8th day of *March* 1853.

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"*A. C. Howard.*"

The statement in the case then was: "Upon which the defendants objected to the admission of any evidence except such as went to prove the first and second grievances in the particulars of demand, to which alone the notice applied. The plaintiff, on the other hand, contended that the notice was unnecessary.

"The judge held that the 4th, 5th and 6th items of the particulars fell within the provisions of the section referred to; and that, so far, the objection must prevail; but that, as regarded the rest of the grievances complained of, the notice was not necessary, or, if necessary, it was sufficient.

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"The case then proceeded; and evidence was given to the following effect."

The plaintiff occupied an estate at *Brereton*, which was situate wholly at the parish of *Brereton cum Smethwick*. The tithes of that parish had, under the Tithe Commutation Acts, been commuted for a rent charge, payable to the rector, who had leased the rent charge to the defendant *Remer*: and *Remer's* right to distrain for arrears was admitted. The sums apportioned on the estate occupied by plaintiff, and owing at the time of the distress after mentioned, amounted, according to evidence given at the trial, to 25*l.* 3*s.* 2*d.* Plaintiff admitted that something was due. Evidence was given to shew a demand of the rent charge before the distress, with notice that, in default of payment within ten days, a distress would be made. On 11th *March* 1853, the defendant *Lucas*, under the authority of his codefendant *Remer*, distrained for the said sum of 25*l.* 3*s.* 2*d.*, and seized three in-calf heifers, tied up with other cattle, in a cowhouse occupied by the plaintiff, being upon premises subject to the rent charge, and, on the same day, served the plaintiff personally with a notice of distress, pointing out to him, at the time, in their stalls, the cattle which he had so distrained, and telling him on what grounds and for what amount the distress was made.

The notice of distress was set out in the case stated, whereby it appeared that the distress was for arrears of rent charge in lieu of tithes.

The statement in the case then was that "It was further in evidence that the heifers so seized were never removed from their stalls. That no padlock, nor any additional fastening, was placed upon the door of

the cowhouse; nor was any notice given to plaintiff of the place where they were impounded: but that two bailiffs were left in possession, who slept at first in the fodder bin at the head of the cattle, and afterwards in a saddlehouse near the cowhouse: and one of them swore that he privately marked the heifers shortly after they were seized. That the plaintiff's servants, from time to time, turned out the heifers in question, with the rest of their master's cattle, for water, and fed them; but the bailiffs swore that this was done with their assent and permission, and generally under their inspection; and that they watched the heifers, and saw them several times every day. It was also attempted to be shewn that, on two occasions, while they professed to be in possession, the bailiffs were both absent from the land in respect of which the rent charge was payable, for about an hour on each occasion: but on this point the evidence was contradictory."

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On 17th *March* the three heifers, so seized, were valued and sold by auction. "It was attempted to be shewn that, on the *Sunday* following the distress, the three heifers so distrained were wholly removed from the premises, and three other heifers of the plaintiff substituted in their stalls: that the heifers sold in satisfaction of the distress were those which had been so substituted; and that the heifers originally seized had never been recovered by the plaintiff. This was left to the jury. Witnesses were called on both sides; and the case went to the jury, who found for the defendants."

One question for the opinion of the Court was stated to be:

1. "Whether the evidence tendered by the plaintiff in support of the 4th and other grounds of action, men-

1853. tioned in his particulars, was properly rejected : it being

HOWARD contended that on some of the grounds of action stated
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REMER. therein such notice was not necessary."

(Several other questions were stated, as to which no decision was pronounced.)

Watson, for the appellant (plaintiff in the county court). The appellant, no power having been reserved to enter verdict, is entitled to a new trial if, upon any ground, the evidence excluded was admissible. Now he was entitled to shew that the defendants, after abandoning the distress, continued on his premises, and sold his cattle, if either the notice, as given under stat. 5 & 6 *Vict. c. 54. s. 19.*, is sufficient to comprehend the case, or if no notice at all is necessary. That section enacts that no distress made for any rent charge payable under that Act, or other recited Acts (comprehending the other Acts applicable to this case), shall, by reason of any irregularity or unlawful act afterwards done, be deemed a trespass ab initio; and adds: "but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage in an action upon the case; provided nevertheless, that no plaintiff shall recover in any action for any such unlawful act or irregularity, if ten days' notice in writing shall not have been given to the defendant by the plaintiff of his intention to bring such action before the commencement thereof, or if tender of sufficient amends has been made by the party distraining, or his agent, before such action brought, or if after action brought a sufficient sum of money shall have been paid into Court, with costs, by or on behalf of the defendant." Now, if what was done after the alleged abandonment be a part of the

proceedings under the distress, then it is comprehended under the words of the notice, "continuing in my premises for several days," and "against my will and consent, on the 17th day of *March* instant, did, at *Brereton* aforesaid, then and there seize, sell, drive away and remove from my premises at *Brereton* aforesaid three heifers belonging to me." But, if what was done after the abandonment of the distress was wholly distinct from the distress, then no notice at all was necessary. The latter seems the more correct view; but the evidence was receivable on either alternative. (He also mentioned other points, on which no decision was pronounced.)

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Welsby, for the respondents (defendants in the county court). The notice manifestly points to the first two heads of the particulars: it is confined to things done under the distress; and the first two heads comprehend all done under the distress, including the sale. These heads therefore exhaust the notice. The fourth particular is for matter distinct. [Lord *Campbell* C. J. Why not consider it a different mode of stating the same fact?] It appears to assume that all acts which can be proved under the first two particulars, that is (as already explained) under the notice, are acts done under the distress: and it thus undertakes to shew something besides the proceedings under the distress. But these the notice does not include. If, however, the fourth head of particulars is to be construed as applicable to what could be shewn to have been done after an abandonment of distress, and an act so done is not an irregularity in the distress, it must be admitted that stat. 5 & 6 *Vict. c. 54. s. 19.* is inapplicable to the fourth head.

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Watson, in reply, was stopped by the Court.

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LORD CAMPBELL C. J. I confess that I am surprised and grieved to find an appeal from a county court raising such subtleties. We have got rid of objections which could be taken only by special demurrer: but really the point here taken is as remote from the merits of the case as any of those objections could be. It is most desirable that a county court judge should decide on the merits. In this case there must be a new trial, which I am very sorry for, since it is caused by the learned judge having refused admissible evidence. The act complained of under the fourth head was either one for which an action might be brought without any notice at all, or the notice is sufficient. If the act was done in the course of the distress, then notice was necessary: but in that case the notice here given, which contains very large language, was amply sufficient. If, on the other hand, the act was done after the distress was over (which I rather take to be the true view, seeing that it is charged that the distress had been previously abandoned), then no notice was necessary; for the act would then be merely a trespass, for which an action would lie, subject to the common law incidents. There must therefore be a new trial.

COLERIDGE J. I am of the same opinion. If the items in the particulars were expanded into separate facts, the fourth head would set out a complaint for continuing on the premises and doing an unlawful act after a formal abandonment of the distress. It is clearly not a complaint for any thing unlawful or irregular in the sale or disposition of the distress. For, giving the

largest explanation of the term "distress," still the abandonment cuts that proceeding short and leaves the parties, as to all that follows, in the position which they would have held before there had been any distress at all. That being so, no notice would be necessary. But put it the other way, and take the whole transaction as a proceeding under the distress: then I agree with my Lord that this notice, especially when produced upon a proceeding in a county court, must be so construed as to embrace the cause of action.

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WIGHTMAN J. When we compare the fourth head of particulars with the notice, we cannot but see that the objection which prevailed in the county court was one of extreme technicality. It seems to me that the notice was quite large enough to admit all that could be given in evidence under the fourth head. And I agree with my Lord that either no notice was requisite or this was sufficient. And I also fully agree that these notices should not be made liable to such technical objections.

CROMPTON J. I am of the same opinion. If any notice was required, this was amply sufficient: I incline to think that none was required. I quite agree that we should construe the notice, which the statute requires, most liberally.

Verdict set aside, with costs; and new trial ordered.

1853.

Thursday,
November 17th.

The QUEEN against Lord WELLESLEY.

Tenant in fee of copyhold hereditaments devised them to E., M. and W. on certain trusts. E. demanded admittance: the steward refused admittance, except upon payment of a treble fine. This Court, without deciding as to the amount of the proper fine, made absolute a rule for a mandamus commanding to admit, the lord being bound to admit before payment of fine, and the right to the fine accruing only by reason of the admittance.

BARSTOW, in last *Trinity* Term, obtained a rule calling on *William Richard Arthur Pole Tylney Long Wellesley*, commonly called Viscount *Wellesley*, lord of the manor of *Wanstead and Stone Hall*, in *Essex*, and *John Coverdale*, his steward of the said manor, to shew cause why a mandamus should not issue, commanding them to admit *Emma Withers* to certain copyhold hereditaments, holden of and parcel of the said manor.

From the affidavits it appeared that *James Withers*, being tenant in fee of the copyhold hereditaments in question, by his will, dated 8th *December* 1848, devised the same to his wife the said *Emma Withers*, his sister *Ann Withers* (now *Ann Burton*), *Thomas Mumford* and *Joseph Wood*, their executors, administrators and assigns, upon certain trusts. *James Withers* died on 5th *April* 1852.

Ann Burton had disclaimed the trusts and all estates in respect thereof.

At two customary courts of the manor, holden respectively on 25th *October* and 17th *December* 1852, proclamations were made for the heir to be admitted.

By an indenture of 4th *February* 1853, reciting that *Mumford* and *Wood* were desirous to release their estate in the copyhold hereditaments to *Emma Withers*, her heirs and assigns, to the intent that she alone might be admitted, to hold the same on the trusts of the will, it

was witnessed that, for the nominal consideration therein mentioned, *Mumford* and *Wood*, and each of them, did grant, release and confirm to *Emma Withers*, her heirs and assigns, all &c. (including the copyhold hereditaments in question), to hold the same unto and to the use of *Emma Withers*, her heirs and assigns, for ever, to the intent that she, her heirs and assigns, might be solely seised thereof at the will of the lord, according to the custom of the manor, but, nevertheless, upon the trusts of the will.

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At a customary court of the manor, holden on 8th February 1853, *Emma Withers* attended, produced the will and deed of release, and demanded to be alone admitted, stating her readiness to pay a single fine of 260*l.* (two years' rental) and the fees. *Ann Burton* at the same time attended to disclaim and refuse to be admitted: but, as to her interest, no question was made. The steward, however, refused to admit *Ann Withers* as sole tenant, and required that either *Emma Withers*, *Mumford* and *Wood*, or *Emma Withers* on behalf of the three, should be admitted, for the purpose of obtaining a treble fine, amounting to 455*l.* (a).

At this court the third proclamation was made, and seizure awarded; which the steward had threatened to carry into effect.

The steward deposed that he was willing, on payment of the treble fine, to admit any one devisee, or any one or more on behalf of the three.

Willes now shewed cause. *Mumford* and *Wood* cannot disclaim; their execution of the deed is itself an

(a) It was deposed that this was calculated on the principle laid down in *Wilson v. Hoare*, 2 B. & Ad. 350.

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act done under the will. And the release is inoperative, so far as regards the present question: it is a transaction between parties who are not tenants on the roll: and the lord is not bound to recognise any conveyance inter vivos which is not on the roll; *Matthew v. Osborne* (a). The case must therefore be considered as if the joint tenancy still existed. Now the admission of one joint tenant is the admission of all; and, on the admission of *Emma Withers*, the lord would be entitled to a treble fine (b). It is understood that, in support of the rule, *Rex v. The Lord of the manor of Hendon* (c) will be cited, as shewing that, there being only a dispute as to the amount of fine, the lord is bound to admit, and must bring his action for the fine which he claims. But, by doing so, the lord would be making evidence against himself, and that of a fact not true, if he admitted *Emma Withers* to the whole: if he admitted her to a part only, he would be giving that which she does not ask. Suppose the devise had been to her alone: could she have claimed to be admitted without paying a fine? The decision in *Rex v. The Lord of the manor of Hendon* (c) applies only where there is a bonâ fide doubt as to the amount due.

Barstow, contra. It is an elementary principle of copyhold law that a fine is not due for admittance till after the admittance has taken place, the admittance being the cause of the fine; 2 *Bac. Abr.* 224 (7th ed.), tit. *Copyhold* (I) 2. The effect of the release therefore need not be considered; the rule must be made abso-

(a) In C. B., January 26, 1853; 22 *L. J. N. S. C. P.* 241.

(b) See 1 *Scriv. Cop.* 296, 320, 347 (4th ed.).

(c) 2 *T. R.* 484.

lute even upon the supposition that the joint tenancy still exists. The steward threatens to seize quousque: but that he cannot do if a single devisee offers to be admitted; *Roe dem. Ashton v. Hutton* (a). *Rex v. The Lord of the manor of Hendon* (b) is directly in point. There the transaction which had taken place out of Court had, in some degree, the appearance of a fraud upon the lord: but the Court said: "they had frequently declared they would give no opinion respecting the lord's fine on an application by a tenant for a mandamus to be admitted, because the lord has no right to the fine at all till admittance. All the lord has a right to require is to have a tenant." That the lord cannot refuse admittance on the ground of his claim to fine, appears also by *Rex v. Wilson* (c). (He was then stopped by the Court.)

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LORD CAMPBELL C. J. This rule must be made absolute. Neither the releasors nor releasee have been admitted. When there is a devise to several as joint tenants, any one has a right to be admitted, valeat quantum. The lord will thereupon become entitled to the proper fine, and will have a remedy for it.

COLERIDGE, WIGHTMAN and ERLE Js. concurred.

Rule absolute.

(a) 2 Wils. 162.

(b) 2 T. R. 484.

(c) 10 B. & C. 80.

1853.

Tuesday,
November 17th.

FOXALL *against* BARNETT.

Defendant, by a warrant of commitment on a coroner's inquisition held without jurisdiction, caused plaintiff to be imprisoned. Plaintiff was bailed, and afterwards, while on bail, procured the inquisition to be quashed.

Held that, in an action for such false imprisonment, plaintiff was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition.

DECLARATION stated that defendant "assaulted the plaintiff, and caused him to be taken into custody, and to be conveyed to and imprisoned in a prison: whereby, and in consequence of which said imprisonment, the plaintiff became and was and still remains sick and disordered, and permanently injured in his constitution and health: and the plaintiff has been obliged to pay and lay out, and to render himself liable to pay, divers large sums of money, together amounting (to wit) to the sum of 200*l.*, in endeavouring to cure his said sickness, and to reestablish his health, and in and about his procuring his discharge from the said custody as aforesaid."

Plea: Not guilty. Issue thereon (a).

On the trial, before *Coleridge J.*, at the last *Gloucestershire* assizes, it appeared that the defendant was coroner of the county of *Gloucestershire*; and, as such coroner, had held an inquest, on the 15th, 17th and 28th *September*, 1852, on the body of one *Thomas Boulton*, then lying in the county of *Gloucestershire*. The inquisition, however, was held in the county of *Monmouthshire*. The jury found a verdict of manslaughter against the plaintiff; and the defendant thereupon, by his warrant, committed the plaintiff to *Gloucester* gaol. The plaintiff

(a) Another plea, pleaded to the above declaration, ended in a demurrer, which had not been argued when the case was tried. The venire was to assess damages on this part of the record, as well as the rest.

was afterwards admitted to bail by a Judge. Subsequently the inquisition, having been brought into this Court by certiorari, was quashed, in last *Hilary* Term, as having been taken without jurisdiction.

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The plaintiff, at the trial, gave evidence for the purpose of shewing the extent of the injury inflicted, and the amount of expense which he had incurred: and, among other expenses, gave evidence to shew the expenses which he had incurred in procuring bail and quashing the inquisition. The counsel for the defendant contended that the plaintiff could not, under this declaration, recover for the last mentioned expenses. The learned Judge directed the jury to estimate these amounts separately; and they found that the expense of procuring bail amounted to 25*l.* 13*s.* 1*d.*, that of quashing the inquisition to 46*l.* 2*s.* 5*d.*, and the damages *ultrà* to 25*l.*; and they gave a verdict for the plaintiff, for 96*l.* 15*s.* 6*d.* in all. Leave was reserved to reduce this by 71*l.* 15*s.* 6*d.*

In this Term, *Keating* obtained a rule to reduce the damages by 46*l.* only, as the expense of quashing the inquisition.

H. James and *Holl* now shewed cause. It is true that none but direct damages can be recovered, unless they are specially averred in the declaration. But the expense of quashing the inquisition was a direct damage to the plaintiff resulting from the act of the defendant; or, at the least, it falls within the description of laying out sums of money "in and about his procuring his discharge from the said custody." He was not indeed in actual custody when the inquisition was quashed, because he had been bailed; but a man who is bailed is in vir-

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BARNETT. tual custody; his bail are supposed to have him in their custody, and may at any time render him; 3 *Hawk. Pl. Cr.* 186 (7th ed.), B. II. Ch. 15. s. 3. [Lord *Campbell* C. J. In some cases it is necessary, before bringing an action for false imprisonment, to get the conviction quashed: but I do not know that this is necessary in the case of an inquisition.] It may not be necessary for the purpose of bringing an action: but, till the inquisition is quashed or the party has appeared to it, he is in custody. The bail are under recognizance that he shall answer the charge: their power over him continues till they are discharged from this recognizance: and this discharge can be only by the inquisition being quashed or the party appearing.

Keating, contra. The imprisonment complained of in the declaration, and to get rid of which it is alleged that the expense was incurred, is the imprisonment by the defendant, under his warrant. That was got rid of when the plaintiff was bailed. It may be that, in construction of law, a fresh imprisonment commenced virtually when the prisoner was bailed: and, if so, the plaintiff might perhaps have recovered the expense of quashing the inquisition on a declaration complaining that he had been compelled to procure bail, and had been put to expense in liberating himself from their custody. [*Wightman* J. The discharge from the first imprisonment seems not to be perfect till the inquisition is put an end to in some way.] The necessity for putting an end to it ceases on bail being given. In *Holloway v. Turner* (a) the plaintiff's goods were seized on an illegal warrant of

(a) 6 Q. B. 928.

attorney and judgment: and it was held that plaintiff, in trespass for the seizure, could not recover for the expense of setting aside the judgment, though specially claimed in the declaration. Lord *Denman* there said: "The plaintiff might have recovered these costs in a proper form of proceeding, but he cannot sue the defendants for a trespass per quod he was put to expense in removing the cause of the trespass." *Barton v. Bricknell* (a) illustrates this. Suppose, in the present case, the plaintiff had been bailed as soon as the verdict was found: could he have brought trespass for false imprisonment? [*Coleridge J.* In the passage in *Hawkins* referred to by Mr. *James*, it is said that, though mainperners are merely sureties, the bail may take the party to gaol: while that state of things lasts, is he a free man?] He is so as to the custody of which the declaration complains: the following custody, if it be one, is of a very special kind. The defendant, by this proceeding, has no mode of taxing the costs of quashing the inquisition. The plaintiff might, after being bailed out, have waited till the assizes, when the inquisition must have been quashed: the only difference to him would have been that his status, as a party bailed, would have continued longer.

Lord CAMPBELL C. J. If the plaintiff had been discharged out of custody, and then had sought to set aside the inquisition, I should have thought he could not recover the expense of doing so: that would have been a state of things analogous to that which existed in *Holloway v. Turner* (b). But the facts here are quite

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(a) 13 Q. B. 393.

(b) 6 Q. B. 928.

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different. The plaintiff was released only from imprisonment within four walls: he still had to restore himself to a state of freedom; which he did not do until he had the inquisition set aside: till then the imprisonment was not done away with. The damage, therefore, necessarily arose from the act complained of: and the rule must be discharged.

COLERIDGE J. I am of the same opinion. The plaintiff brings trespass for imprisonment under the unlawful command of the defendant. It is admitted that he is entitled to recover such special damage as can be truly stated to have been necessarily incurred in procuring his discharge from that imprisonment. When there are two stages necessary for this, I cannot distinguish between the two, as to the right to recover damages. If the plaintiff had been set free at the first stage, I agree that he could not have recovered in respect of anything which he afterwards did. But that was not so: the plaintiff, by being bailed, was merely put into the hands of persons who might at any time have replaced him in the gaol: the expense of removing him from that position was only one of the steps necessary for completing his discharge from the original imprisonment.

WIGHTMAN J. The necessity of setting aside the inquisition was caused by the original imprisonment, and by that only; for, had there been no such imprisonment, the necessity would not have existed. The plaintiff, by being bailed, obtained only an imperfect release: to get an entire release, he was under the necessity of getting the inquisition set aside. The setting aside the

inquisition was, therefore, the legal consequence of the first imprisonment. *Holloway v. Turner* (a) has been satisfactorily distinguished from this case by my Lord (b).

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(ERLE J. had left the Court.)

Rule discharged.

(a) 6 Q. B. 928.

(b) See *Hadley v. Baxendale*, 9 Exch. 341.

STAPYLTON against JOHN CLOUGH and ROBERT CLOUGH.

Thursday,
November 17th.

EJECTMENT for lands in *Yorkshire*. The two defendants put in separate defences; but *John Clough* did not ultimately defend.

On the trial, before *Wightman J.*, at the last *Yorkshire Assizes*, it appeared that the defendants held the premises in question, consisting of a farm and lands, as tenants from year to year to the plaintiff, the year commencing on 6th *April*. *John Clough* did not reside on the farm: but *Robert Clough* did. The case for the plaintiff was that notice to quit had been served on one *William Clough*, the father of *Robert Clough*, before the 6th of *October*, and had reached *Robert Clough* before that day. To establish this, evidence was given that one *George Jackson*, who had died before the trial, was employed by *William Marshall*, the managing land

In order to prove notice to quit to have been served upon *R.*, a tenant from year to year, it was proposed to shew that the notice had been served on *W.*, *R.* being absent, and had reached *R.* It was shewn that *J.*, a person deceased, was ordinarily employed for the landlord, to serve notices to quit: that a notice requiring *R.* to quit had been handed to *J.*, who had brought back the duplicate, and had then orally

and had signed an indorsement stating service on *R.*, and, further, that *J.* stated that he had delivered the notice to *W.*

Held: that *J.*'s oral declaration was not admissible, as not appearing to have been made in the ordinary course of his business.

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agent for the property, to serve notices on the tenants, including notices to quit; and that, when *Jackson* served such notices, it was his duty to inform *Marshall* of the facts. A written notice, requiring *Robert Clough* to quit, was produced, on the back of which was written: "29th September 1852. Delivered a duplicate to *Robert Clough*. *George Jackson*:" and it was proved that the signature was in *Jackson*'s hand writing. *Marshall* gave evidence that, on the 29th September 1852, he delivered this paper to *Jackson*, the day of the month not being then inserted, and it being then unsigned, with directions to serve it on *Robert Clough*: that in about an hour *Jackson* returned, and stated to *Marshall* that he had served it, not on *Robert Clough*, but on *William Clough*, the father of *Robert Clough*. *Jackson* then signed; and "29th" was inserted. It appeared that during all this day, and for some days after, *Robert Clough* was absent from the premises. Evidence was also given of language subsequently used by *Robert Clough*, as shewing that he had received this notice. It was objected, by the counsel for the defendant, that proof of the oral statement of *Jackson* could not be given. The learned Judge refused to stop the case: and the jury found for the plaintiff.

In this Term, *Atherton* obtained a rule *Nisi* for a new trial.

Knowles and *W. S. Cross* now shewed cause. The principal question in this case is, whether the oral declarations of a deceased agent, as to acts done in the course of his agency, are receivable in evidence. That an indorsement, written by such deceased agent, of service of notice to quit is receivable, was decided in *Doe*

dem. Patteshall v. Turford (a). [Wightman J. At the trial, it struck me, as a very stringent objection, that the oral declaration of the deceased person was offered for the purpose of contradicting his own written memorandum.] The writing, though admissible in evidence, might be contradicted, as a receipt may. [Coleridge J. The usual course of the business clearly was to indorse on the notice a memorandum of the service; and that was done: but what evidence was there that it was in the usual course of the business to make oral statements contradicting such written indorsement?] The duty to serve the notices carries with it the duty to report the fact of service according to the truth. [Coleridge J. Suppose the declaration in *Doe dem. Patteshall v. Turford (a)* had been oral, and it had appeared that the ordinary course was to write an indorsement: would that have made no difference in the result of the case?] It would have made none. If the service of the notice was made in the ordinary course of business it is unimportant what was the ordinary course of reporting the service. Lord Tenterden's judgment in *Doe dem. Patteshall v. Turford (a)* appears indeed to put the case on the ordinary course of reporting the service: but the judgment of Taunton J. proceeds on the more general ground. In *Poole v. Dicus (b)*, where an entry by a deceased clerk of a notary, respecting the dishonour of a bill, was admitted, Tindal C. J. said: "We think the evidence in question was admissible; and we think it admissible on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred." Numerous authorities

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(a) 3 B. & Ad. 890.

(b) 1 New Ca. 619.

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as to the admissibility of declarations by deceased agents are collected in *Fursdon v. Clogg* (a), where the question as to an oral declaration was raised, but not decided. But in the case of *The Sussex Peerage* (b) there was an implied holding in favour of the admissibility of the oral declaration. A question there arose as to the admissibility of the oral declaration of a deceased clergyman respecting a marriage which he said he had celebrated. An attempt was made to shew that this was admissible, upon the authority of *Higham v. Ridgway* (c), on the ground of its being (under the particular circumstances of the case) a declaration against his own interest: and this ground failed: but oral declarations were there not distinguished from written ones; and Lord Campbell said (d): "By the law of England the declarations of deceased persons are not generally admissible, unless they are against the pecuniary interest of the party making them. There are two exceptions: first, where a declaration *by word of mouth or by writing* is made in the course of the business of the individual making it, there it may be received in evidence, though it is not against his interest; *Doe dem. Patteshall v. Turford* (e). The service of a notice may thus be proved; and, in like manner, an entry by a notary's clerk that he had presented a bill, for that is in the ordinary discharge of his duty." [*Coleridge J.* Where the declaration, by word of mouth or by writing, fulfils the conditions requisite for the admissibility of declarations, it may be indifferent by which of the two the declaration is. Lord Campbell C. J. That is what I wish to be understood as having meant.] The cir-

(a) 10 *M. & W.* 572.(b) 11 *Cl. & F.* 85.(c) 10 *East*, 109.(d) 11 *Cl. & F.* 113.(e) 3 *B. & Ad.* 890.

cumstance that what is offered is or is not written does not make it more or less a declaration: there may be a difference as to the weight which a jury will attach to it. In strictness, the written memorandum here was not in the course of business, but the oral declaration was; for the proper and ordinary course of business was to state the truth. *Brain v. Preece (a)*, which was cited on moving, turned on a different point. [*Wightman J.* On what ground did you make the written memorandum evidence?] As part of the history of the transaction. [Lord Campbell C. J. It would be evidence only as coming within the doctrine established in *Doe dem. Patteshall v. Turford (b)*.] The material evidence was the oral declaration. And, further, the oral declaration was admissible as part of the *res gesta*. The notice, by the indorsement, appeared to have been delivered to *Robert Clough*: the oral declaration shewed how it was delivered: the whole is a single transaction. [*Cole-ridge J.* If so put, can you say that the two were contemporaneous?] It is not necessary that they should be literally so; *Rouch v. The Great Western Railway Company (c)*.

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Atherton, *contra*, was stopped by the Court.

LORD CAMPBELL C. J. I am of opinion that the oral declaration of *Jackson* was not admissible. I agree with the decision in *Doe dem. Patteshall v. Turford (b)*, and other cases of similar effect. Those are cases in which evidence is admitted which satisfies the legal test of sincerity, and will presumably assist in the investigation of the truth. And, as at present advised, I adhere to

(a) 11 M. & W. 773.

(b) 3 B. & Ad. 890.

(c) 1 Q. B. 51. See *Ferrand v. Milligan*, 7 Q. B. 730.

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the doctrine, attributed to me in the case of *The Sussex Peerage* (a), that, if a declaration be made in the discharge of a duty by a deceased person, it is admissible, whether oral or written. But it would be most dangerous to superinduce on this the doctrine that whatever he has said at any time is admissible. How can it be said that here the oral declaration was made in the ordinary discharge of a duty? The indorsement of the memorandum was so made; but, when *Jackson* had signed that, he had completed his duty; and the subsequent statement, which contradicted that, cannot be considered as having been made in the ordinary course of business. We must therefore hold it inadmissible, unless we are prepared to adopt the rule that whatever has been said by a deceased person is admissible in evidence, which is not yet the law of *England*.

COLERIDGE J. I am of the same opinion. The principle of *Doe dem. Patteshall v. Turford* (b) is, I think, correct. It may be difficult to make out the facts requisite for satisfying the condition of admissibility there established: yet it is not doubtful what the condition is. Still the admissibility is an exception from the general law of evidence, allowed upon the ground that credit may be given to what is done in the ordinary discharge of a duty. Unless an act be done in the ordinary course of business, it is not done in the ordinary discharge of the duty. You must, therefore, lay the foundation for the admission of the evidence by shewing that the act was done in the ordinary course of business. In *Doe dem. Patteshall v. Turford* (b) this was very clearly proved: and proof of this, either express or by

(a) 11 Cl. & F. 113.

(b) 3 B. & Ad. 890.

implication, must be given, wherever it is sought to apply that authority. In the present case we give credit to the indorsement on the ground that it is the ordinary mode of recording the service of a notice. Then Mr. *Knowles* says that no distinction can be made between a written and an oral declaration. And frequently the two would not be distinguishable, where the oral declaration is itself in the ordinary course of business. But here the very ground of admission is that the written declaration is made in the ordinary course of business: there is nothing to shew that the oral declaration was so made.

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WIGHTMAN J. It appears to me that it would be very dangerous if, in addition to admitting the evidence of a written entry made in the ordinary course of duty, evidence of a declaration made by word of mouth, either at the same time or after, could be admitted as explaining that which is itself admissible only as being made in the ordinary course of business. And this was urged at the trial: but I did not like to stop the case, because, by rejecting the evidence, I should, if I were incorrect, have put the parties to a great expense. I think the argument urged in support of the admissibility of the evidence goes far beyond any authority which has been cited. It may be that an oral declaration, made in the ordinary course of business, is admissible in evidence; but it cannot be that, where the ordinary course of business is to put the declaration in writing, evidence of oral declarations is admissible to explain the written one.

(ERLE J. had left the Court.)

Rule absolute.

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Saturday,
November 19th.

The QUEEN against The Inhabitants of
LLANFAETHLY.

A person, not a party to a cause, served in due time with a subpoena duces tecum to produce a document at the trial of the cause, without any legal excuse disobeyed it, and did not produce the document.
Held: that secondary evidence of its contents was not admissible under such circumstances.

ON appeal against an order of two justices of the county of *Anglesey* for the removal of *William Hughes*, labourer, and his wife and infant children, from the parish of *Llancilian* in *Anglesey* to the parish of *Llanfaethly* in the same county, the order was confirmed, subject to the opinion of the Court of Queen's Bench on a case, the material parts of which were as follows.

The pauper, *William Hughes*, having acquired a settlement in the appellant parish, afterwards, in *November* 1838, hired, as tenant from year to year, at the yearly rent of 14*l*, a tenement in the parish of *Llandyfrydog*, which he held, occupied, and resided on for three years, and paid the rent yearly for the same. The case stated that "*William Hughes* proved that he was rated to the poor rate as tenant of the said tenement at 2*s*. 6*d*. each rate; and that, during the first year of his tenancy, he paid to *Rowland Evans*, one of the overseers of the poor of the said parish of *Llandyfrydog*, at different times, five or six poor rates of 2*s*. 6*d*. each rate; which, he believed, were all the rates assessed on his tenement for the first year he occupied it. That *Rowland Evans* always produced the rate book when he called upon him for his poor's rate;" but that "he paid no rates after the first year. *Rowland Evans* proved he was a rated inhabitant, and one of the overseers of the poor of

Llandyfrydog for the years 1838 and 1839, and was still a rated inhabitant of that parish. That the pauper, *William Hughes*, was rated to the poor rates, for the tenement he held at *Gadfa* in that parish, at 2s. 6d. each rate; and that he used to call on him regularly for his poor's rates during the year he was overseer of the poor; and that the pauper paid some of the poor rates, but how many he could not say. That he delivered the rate book at the end of the year to Mr. *Robert Prichard* of *Llwydiarth Esgol*, solicitor, one of the principal rated inhabitants of the parish of *Llandyfrydog*; that his co-overseers had since died. The said *Rowland Evans*, the surviving overseer of the poor for 1838 and part of 1839, and *John Owen* of *Pen-y-graigiven*, one of the overseers who succeeded *Rowland Evans*, and also one of the overseers of the poor of *Llandyfrydog* for the years 1852 and 1853, and also the said *Robert Prichard*, and *Hugh Jones*, who are the present churchwardens of the said parish of *Llandyfrydog*, were regularly served with subpœnas duces tecum to produce on the hearing of the said appeal all and every the rate books of the said parish of *Llandyfrydog*, and all and every the poor rate assessments, bills, rates or levies for the same parish for the year 1838, and from thence for each and every year, up to and including the year 1852. Notice was also served on the churchwardens and overseers of the said respondent parish of *Llancilian*, to produce the same rate books, assessments, bills, rates and levies of the said parish of *Llandyfrydog* for the same years. The said *John Owen* of *Pen-y-graigiven* proved that he, during the year he was overseer, collected the rates in the end of the parish where the

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pauper had lived ; and, on his cross examination, he stated that he delivered the poor rate book to his co-overseer, *John Owen* of *Ynysgoed*, who collected the rates in the other end of the parish. He also proved that the last named *John Owen* was alive. The said *Robert Prichard* did not appear at the Sessions in pursuance of the subpoena duces tecum served upon him ; but the other parish officers of *Llandyfrydog* did appear, in pursuance of the subpoenas duces tecum served on them. They were sworn and examined, and pressed to produce the rate books of the parish of *Llandyfrydog* : but they did not produce any of the rate books of that parish."

The question for the opinion of the Court was stated to be : "Whether, under the circumstances before stated, the pauper gained a settlement in the parish of *Llandyfrydog* by renting a tenement or by payment of rates. And, as the parish officers had been served with subpoenas duces tecum to produce the poor rates of that parish as before stated, and they not having produced the same, Whether the parol evidence of the pauper and of the said *Rowland Evans*, the overseer of the poor of *Llandyfrydog*, was sufficient evidence of rating and payment to establish a settlement by rates in that parish. If the Court should be of opinion that, under the circumstances stated, the pauper gained a settlement in *Llandyfrydog*, either by renting a tenement or by payment of rates, the order of removal and of Sessions was to be quashed : if not, to be confirmed."

Morgan Jones, in support of the order of sessions. The case is not artificially stated ; but it sufficiently

appears that the question submitted to this Court is whether there was legal evidence that *William Hughes* was assessed to the poor rate in respect of the tenement which he occupied in *Llandyfrydog*. The proper evidence of that is the rate book; *Rex v. Coppull (a)*. Is there here a foundation laid for giving secondary evidence of its contents? If the book had been shewn to be in the custody or under the controul of the officers of the poor of the respondent parish, the notice to produce would have been sufficient: but the book appears to be in the custody of *John Owen*, of *Ynisgoed*, who is not subpœnaed. Even supposing that the rate book is shewn to have been in the custody of *Prichard*, or of the overseers of *Llandyfrydog*, they had no legal excuse for refusing to produce it. If they had had such an excuse, the appellants would, by the subpœna, have done all that was in their power to compel the production of the original; but, as it is, they may still compel the production. No case has gone so far as to say that a mere difficulty in giving primary evidence arising from the disobedience of a third party to a subpœna duces tecum renders secondary evidence admissible. [He was then stopped by the Court.]

Welsby, contra. [Lord Campbell C. J. Assume for the present that in fact all that could be done before the trial, to secure the production of the rate book, has been done; and that the only reason why it was not produced was the improper conduct of the party served with a subpœna duces tecum. If you establish that, under

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such circumstances, parol evidence would be admissible, we will then enquire whether all in the power of the appellants has been done.] The best evidence in the power of the party is required. He must therefore produce a document, unless there is, as Lord *Kenyon* says in *Rex v. Coppull (b)*, a “reasonable account given for their non production.” It is not necessary that it should be shewn that the document is destroyed: if, for instance, the witness refuse to produce it because he has a lien on it, secondary evidence is admissible.

Lord CAMPBELL C. J. What Lord *Kenyon* says in *Rex v. Coppull (a)* must be understood with reference to the facts of that case. The rate book there was in the custody of the appellants, the party to the cause; and, if the parish of *Llandyfrydog* was a party to the suit here, there would be ample foundation for secondary evidence: but I am of opinion that the mere disobedience of a third party to a subpoena duces tecum calling on him to produce a document does not render secondary evidence of its contents admissible. It has been held that, where the party served refuses to produce the document on the ground of some privilege, and the Judge at the trial admits his privilege, secondary evidence of its contents is admissible: but in such a case the holder of the document is justified in his refusal, and there is no further remedy to compel production. In such a case as the present there is no justification. The parties are bound to obey the subpoena; and they may be punished for their disobedience.

(a) 2 *East*, 25.

ERLE J. (a). The appellants have, as part of their case, to prove the contents of a written document. They must therefore produce that document, or account for its nonproduction. They say they do account for it, because they served with a subpoena duces tecum the person who had it, and he did not produce it. I think that is not the fact; they seem to have served the parties who, as they thought, had it, but not the person who really had it: but, supposing that the facts were as they say, I am of opinion that the Sessions ought to have refused to admit secondary evidence. It may be a hardship on a party to be defeated at the trial because a third person does not obey the process of the Court; but there would be great liability to abuse if that dispensed with the production of evidence. I am of opinion that the law does not admit the disobedience of a person served with a subpoena duces tecum as a sufficient excuse for not giving primary evidence of the contents of a document, where the person served is punishable for his disobedience.

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Order of Sessions confirmed.

(a) *Coleridge* and *Wightman* Js. were absent.

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Monday,
November 21st.

M'RAE, Deputy Chairman of The THAMES PLATE
GLASS COMPANY, *against* M'LEAN.

By order of Nisi prius, and consent of parties, a cause was referred to an arbitrator, who was to determine what he should think fit to be done by the parties respecting the matters in dispute; the costs of the cause to abide the event; the costs of the reference and award to be in the discretion of the arbitrator. Power was reserved to the Court, in case of any objection being made to the award, to refer back the cause to the same arbitrator.

The arbitrator awarded in favour of the plaintiff, ordering defendant to pay the costs of the reference and award. On motion to set aside the award, as uncertain and not final, the Court ordered the award to be referred back to the arbitrator, for the purpose of his deciding on certain matters specified in the order. Nothing was said as to costs in this order.

The arbitrator made an amended award, deciding on the matters referred back, confirming his first award in all other respects, and ordering the defendant to bear the costs of the amended award.

Held that he had power to make this order as to costs, under the original order of reference.

FIRST count, on a bill of exchange drawn by defendant, and indorsed to the Company; second count, for goods sold and delivered, and on an account stated. Pleas: 1. Payment to the amount of the moneys in the declaration mentioned, accepted by the Company in full satisfaction. Replication, traversing this. Issue thereon. 2. As to the last count, Non assumpsit. Issue thereon. The particulars of demand relating to the last count amounted to 2517*l.* 4*s.* 2*d.*, and comprehended different articles of glass. The items were very numerous: the last was for 56*l.* 6*s.* 7*d.*; and to this were prefixed the words "Not delivered."

By an order of Nisi prius, and consent of parties, a verdict for the plaintiff was found, subject to the award or a certificate of an arbitrator, "to whom all matters in difference in this cause between the said parties are hereby referred, to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute." "It is also ordered that, in case of any objection being raised to the award which shall

have been made in pursuance of this order, the said Court" (of Queen's Bench) "shall have power to refer back the said cause to the same arbitrator." "It is likewise ordered, by and with the like consent, that the costs of the cause shall abide the event and determination of the said award or certificate, and the costs of the reference and award or certificate be in the discretion of the said arbitrator, who shall award or certify by whom to whom and in what manner the same shall be paid." And that this Court might be prayed that the order should be made a rule of Court.

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On 16th *February*, 1853, the arbitrator made his award, whereby he found that the defendant "did not pay to the Company, nor did the Company accept of or from the defendant, the sums in the first plea of the defendant in the said cause mentioned, or any part of them, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, in manner and form," &c.; and, as to the second issue, that the defendant "did promise in manner and form as the plaintiff has in the declaration in the said cause complained; and he awarded damages by reason of non-performance of the promises in the declaration, 318*l*. 9*s*. 9*d*.: and that defendant should pay to plaintiff his costs of the reference, and bear his own costs of the reference and of the award.

On 18th *April*, 1853, the submission was made a rule of Court.

On 19th *April*, 1853, *O'Malley* obtained a rule calling on the plaintiff to shew cause why the award should not be set aside, or why it should not be referred back to the arbitrator for his reconsideration and determination "on the following grounds: viz. That the award is not

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final, in not deciding upon the rights of the parties to the goods charged for in the last item of the plaintiff's particulars of demand, and directing what should be done with such goods; that, in this respect, it does not determine all the matters in difference; and that the award is uncertain and not final, in awarding generally the plea of payment, and not shewing whether the finding applies to both counts."

On 5th *May*, 1853, "upon hearing Mr. *J. Brown*, of counsel for the plaintiff, and Mr. *O'Malley*, of counsel for the defendant, It is ordered that the award made herein be referred back to" "the arbitrator, for the purpose of his deciding what is to be done by the parties, or either of them, in respect of the glass which is mentioned in the last item of the plaintiff's particulars, and also to find distributively on the issue on the plea of payment."

On 13th *June*, 1853, the arbitrator made his amended award, reciting the rule last mentioned, and proceeding: "and whereas, in pursuance of such rule of Court, and in obedience thereunto, I, the said" (&c.), "having duly considered of the matters so referred back to me by the said rule of Court, do hereby make and publish my amended award in writing, of and concerning the matters above referred back to me by the said rule of Court, in manner following; that is to say: I do order, award and adjudge" that the Company should deliver up the glass to the defendant; and he further awarded, as to each issue separately, that the defendant did not pay &c. And he added: "I do further award, order and direct that the defendant do pay the costs of this my amended award; and that, in case the plaintiff shall take up the same, the defendant do, on demand, repay

to the plaintiff what he shall have paid on taking up the same. And in all other respects I confirm my award, made in the matter of this reference on the 16th day of *February* A. D. 1853."

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In this term, *D. D. Keane* obtained a rule, calling on the plaintiff to shew cause "why so much of the amended award herein as orders the defendant to pay the costs of the amended award should not be set aside, on the following grounds: First, that the order of reference did not, neither did the rule of Court referring the award back to the arbitrator, give him authority over the costs of the amended award, or empower him to order that they should be paid by the defendant: Second, that the arbitrator was not entitled to impose on the defendant costs occasioned by the default of the arbitrator himself: Third, that the arbitrator had no power to award, order or direct that the costs of the amended award should be paid by the defendant."

It appeared by the affidavits that the costs of the amended award were 1*l.* 17*s.* 6*d.*, being for stamp and stationery charges exclusively, the arbitrator having charged no fee for himself.

Joseph Brown now shewed cause. The arbitrator had power to give the costs incidental to the amendment, under the original submission. In *Johnson v. Latham* (a) a case was referred back to an arbitrator on one special point: and it was held that a taxation of costs on the first award only was ineffectual, and that there should have been a taxation of the whole costs up to and including the second award. It is only in pursuance of

(a) 2 *L. M. & P.* 205. See *S. C.* 1 *L. M. & P.* 348.

1853. the original submission that the case can be referred
 back at all: that gives power to refer the cause back.
 M'RAE Now under the original submission the arbitrator had
 M'LEAN. power over the costs of the cause, the reference and the
 award.

D. D. Keane, contra. The whole cause was not here referred back, so as to make the second reference a proceeding under the general submission; the reference back was of a particular matter, by consent: in *Johnson v. Latham* (a) power was reserved to send back "the matters, any or either of them," to the arbitrator. In that case *Erle J.* expressly rested his decision on the ground that the reference back was under the original submission. Even if the arbitrator here had chosen to frame his second award as an original single award, and not a supplementary one, he was not bound to hear evidence on any matter but that which was the subject of the second reference; *Re Huntley* (b). This shews that the proceedings are altogether distinct.

LORD CAMPBELL C. J. Whatever power the arbitrator had under the original submission he had impliedly under the reference made back to him. There is therefore no excess of authority in this award of costs.

COLERIDGE J. I am of the same opinion. By the submission, the arbitrator had, originally, power over the costs. The submission provides that, in case of any objection, the case may be referred back by the Court to the arbitrator. The language is very general: nothing

(a) 2 L. M. & P. 205. See S. C. 1 L. M. & P. 348.

(b) 1 E. & B. 787.

is said about costs. Had the power thus reserved to the Court been strictly acted on, there could have been no doubt that the original power of the arbitrator would revive. The reference back was in fact limited to a single point; but nothing was said as to costs. The arbitrator acted in pursuance of the authority originally reserved. As to any inconvenience that may be apprehended, it will be easy in every particular case to regulate the power of the arbitrator.

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WIGHTMAN J. concurred.

ERLE J. My remarks in *Johnson v. Latham* (a) were applied to the case where an attempt has been made to set aside an award, and it is in effect set aside and a new award made, under the power reserved to the Court: There the power to give costs clearly is a single power extending down to the completion of the last award. That would include a case where the entire matter was referred anew. It often, however, happens that the objection to the first award is on a matter of form, and utterly irrelevant to the merits, as where the award is not technically final. On such occasions it is very sensible to say, let the arbitrator comply with the form, and, as to the residue, let the award stand. When this is done, the new award is in one sense supplemental: but, in my judgment, the whole constitutes a single award under the original submission.

Rule discharged.

(a) 2 L. M. & P. 205.

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Thursday,
November 24th.

In the matter of JAMES GESWOOD.

A commitment of a servant, under stat. 4 G. 4. c. 34. s. 3., for absentsing himself need not set forth the evidence on which the conviction proceeded.

But it must shew on the face of it that the prisoner has been convicted of what is an offence within the Act.

It is therefore not sufficient that it shews that the servant absented himself without assigning any sufficient reason.

SCOTLAND, in this Term, obtained a rule to shew cause why a writ of habeas corpus ad subjiciendum, directed to the keeper of the House of Correction at *Stafford*, should not issue, to bring up the body of *James Geswood*, and why, in the event of the rule being made absolute, the prisoner should not be discharged out of custody, without the issuing of the said writ, and without his being brought personally into Court.

The rule was obtained on affidavits, by which it appeared that *James Geswood* had been committed by a justice of peace for *Stafford* under stat. 4 G. 4. c. 34. s. 3. The following were the material parts of the warrant of commitment. "To all constables" &c., "and to the keeper of the House of Correction at *Stafford*:" "Whereas complaint upon oath hath been made to me," a justice, "by *T. S.*, agent for *J. S.*, *F. B.* and *W. W.*, of" &c., "colliers, that *James Geswood*, late of" &c., "did, in the month of *July* last, contract and agree with the said *J. S.*, *F. B.* and *W. W.* to serve them as a collier in their business of colliers, at" &c., "for a certain time, to wit for one fortnight and thenceforth, and from fortnight to fortnight, until either party should have given to the other fourteen days' notice to determine such contract; and, having entered upon and worked under such agreement, and the term of the contract being unexpired, the said *James Geswood* did, on" &c., "unlawfully misdemean and misconduct himself in his said service,

by neglecting and absenting himself from his said masters' service without the leave of his said masters, without having given to his said masters any notice thereof, and without assigning any sufficient reason for so doing, contrary to the form" &c. "And whereas, *James Geswood* being now brought" before the justice, "to answer unto the said complaint, and I having duly examined into the nature thereof, Do adjudge the said complaint to be true; it appearing to me, as well upon the oath of the said *T. S.* in the presence of the said *James Geswood*, as otherwise, that" &c. (repeating the terms of the complaint): "I do therefore convict him, the said *James Geswood*, of his said offence, and do order and adjudge" &c. There was an adjudication of imprisonment for a term, and an order to constables to convey, and to the keeper of the gaol to receive him. Nothing turned on the form of this part of the warrant.

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Scotland was now called upon by the Court to support his rule, no one appearing to shew cause. The commitment ought to set forth the evidence; *John Hammond's Case* (a). [*Erle J.* There was another objection in that case, which was the decisive one, so that what was said there as to setting out the evidence was but a dictum. There have been hundreds of commitments under this statute since that time; and the dictum has been often cited; but I think no one has ever yet been liberated on its authority.] It is not clear whether this is a commitment or a conviction; *Lindsay v. Leigh* (b). There is another objection. The offence here charged is not an offence at law. The absenting himself "without

(a) 9 Q. B. 92.

(b) 11 Q. B. 455.

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assigning any sufficient reason" is consistent with his having a good and sufficient reason, but perversely refusing to assign it to his masters, which would be no offence. [*Erle J.* The Act says simply "absent himself." The conviction says all that the Act does, and more.] It is necessary in such a commitment to negative innocence; *Seth Turner's Case* (a).

Lord CAMPBELL C. J. The first objection cannot be supported. *John Hammond's Case* (b) seems to us well decided, as in that case there was no adjudication of any imprisonment, which was a fatal objection: but we do not think it establishes that it is necessary to set out the evidence in a commitment under this Act. No doubt this is a conviction for some purposes; but it is not such as to require the evidence to be set forth. There is no peculiar hardship in the enactment; for it was always common in Acts to deprive the person convicted of the opportunity of cavilling at the evidence by giving a form of conviction which did not require it to be set out: and now, by stat. 11 & 12 *Vict. c. 43. s. 17.*, such a form is given generally.

But I think the second objection fatal. The commitment must shew an offence within the Act, that the statute has been infringed. Now in this commitment the offence is so described as to make the gist of it to be absenting himself "without assigning any sufficient reason." Had it said "without sufficient reason" it would have been right. But, as it is worded, he might have a sufficient reason which he did not assign.

COLERIDGE J. I will only say that I think the second

(a) 9 Q. B. 80.

(b) 9 Q. B. 92.

objection fatal. The general statement that the prisoner had misdemeaned himself would be too vague; but it is confined and explained by saying he absented himself. Had it stopped there it would have been bad, according to *Seth Turner's Case* (a). It goes on, however, to say "without assigning any sufficient reason." I cannot say that is equivalent to having none. He might have a sufficient reason, and ignorantly or perversely neglect to assign it. I think it desirable to adhere to the decision in *Seth Turner's Case* (a).

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WIGHTMAN J. The first objection rests on a dictum in *John Hammond's Case* (b), which, as far as the decision in that case went, was obiter; that the commitment was a conviction and should set forth the evidence. But I think that *Lindsay v. Leigh* (c) is an authority that this is not a conviction, within the rule requiring a conviction to set forth the evidence. But, as to the second objection, I agree that, if the word "assigning" could be rejected, the commitment would be good; but it cannot be rejected. There is a difference in the sense between not having and not "assigning" cause (d).

Rule absolute to discharge the prisoner.

(a) 9 Q. B. 80.

(b) 9 Q. B. 92.

(c) 11 Q. B. 455.

(d) *Erls J.* had left the Court.

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Friday,
November 25th.

CHARLES TETLEY *against* JAMES EASTON and
CHARLES EDWARDS AMOS.

A patentee, describing his invention in the specification, is to be taken to claim, as part of his invention, all which he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. In an action by a patentee of certain improvements in machinery in raising and impelling water, issues were taken on the plaintiff being the first inventor, and on the novelty of the invention. The specification described a machine in which water was raised and impelled by the action of centrifugal

ACTION for infringing a patent, for "certain improvements in machinery, for raising and impelling water and other liquids, and also thereby to obtain mechanical power," granted to plaintiff, for fourteen years from 11th *February* 1846, by letters patent in the usual form. Averments: of an enrolment, within six months after the date of the patent, of a specification describing the invention: and of the entering by plaintiff with the Clerk of the Patents of *England*, on 14th *April* 1853, of a disclaimer of part of the title of the said invention, and a disclaimer and memorandum of alteration of parts of the specification, which were duly filed by the Clerk of the said Patents. Breach laid as subsequent to the filing of the disclaimers.

Pleas. 1. A denial of the grant by the Queen. 2. That plaintiff was not the first inventor. 3. That the invention was not new. 4. A denial that a specification describing the invention was enrolled. 5. Not guilty. Issues thereon.

On the trial, before *Wightman J.*, at the last *York* Assizes, it appeared that, at the Great Exhibition in

force, through the revolution of a hollow wheel, revolving in manner therein described. The specification did not shew clearly that the wheel was itself not claimed as part of the invention. On the trial, it appeared that the raising of water by centrifugal force acting through the revolution of a hollow wheel was previously known; but there was evidence that the manner in which, in the plaintiff's machine, it revolved was new. The learned Judge directed a verdict for the defendant on the two issues on the novelty.

Held, that for the reason above stated the direction was right, as the claim must be taken to include the wheel.

1851, a centrifugal pump was exhibited. On the machine was inscribed: "Not patented. Given to the Public. Invented by *J. G. Appold*. Manufactured by *Easton and Amos*." This machine, now well known as *Appold's Pump*, was very efficient; and many orders were given to Messrs. *Easton & Amos*, who were the defendants, to manufacture similar pumps. The plaintiff commenced an action against them in the Exchequer, alleging that "*Appold's Pump*" was an infringement of a patent of the plaintiff. On the trial of that action, it appeared that his patent and specification claimed much that was not useful, and much that was not new; and he was nonsuited. He subsequently obtained leave to disclaim, under stat. 5 & 6 *W. 4. c. 83. s. 1*. On the trial of the present cause, the plaintiff's letters patent, dated 11th *February* 1846, the original specification, enrolled 11th *August* 1846, and the disclaimers, filed 14th *April* 1853, were put in evidence. The title of the patent was for "Certain improvements in machinery, for raising and impelling water and other liquids, *and also thereby to obtain mechanical power:*" but the plaintiff disclaimed the part of the title above printed in Italics.

Drawings were attached to the specification, on which was represented, in several figures, complicated machinery. It is sufficient, for the purposes of this report, to state that on these drawings was represented a wheel, the shaft of which was hollow, and communicated with the spokes of the wheel, which were also hollow; with, at the extremity of each spoke, a valve opening outwards, so that any liquid might pass from the interior of the shaft outwards through the spokes, but could not return. One figure in the drawings represented such a wheel placed vertically within a hollow case which

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included the whole wheel; but the hollow shaft at each end passed through the sides of the case. Outside the case the hollow shaft communicated at each end, by a supply pipe, with the reservoir from whence the water was to be raised. A communication by a discharge pipe between the bottom of the hollow case and the place to which it was desired to convey the water was also shewn on the drawing. There was also a representation of an air pump communicating with the interior of the shaft of the wheel, and of machinery for causing the wheel to revolve on a solid shaft, which was represented on the drawing as inside the hollow shaft, and as supporting both it and the wheel.

The specification declared, in the usual form, "that the nature of my invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawings hereunto annexed, and to the figures marked thereon; that is to say" &c. It then contained a statement that, "in order that my improvements may be understood, reference must be had to the accompanying drawings." It then proceeded, with considerable minuteness, to explain the drawings, in substance as above stated, and to explain the operation of the machine, which was that, when, by aid of the air pump, the air within the hollow shaft and spokes was exhausted, the water from the reservoir would, by the pressure of the atmosphere, fill them. That then the wheel was to be caused to revolve; and that, by centrifugal force, the water would pass out of the spokes through the valves at their extremities into the hollow case. If it was not desired to raise the water higher, the case might be open; but, if it was

desired to raise the water higher, the case was to be air tight, and filled with air so much compressed as to balance the column of water in the pipe, from the bottom of the case to the place to which the water was to be conveyed. So far the description of the machine was such as might have been given in explaining it for any other purpose than that of a specification, and contained nothing to indicate what part was claimed as the patentee's invention, and what part was old. This part of the specification was not altered by the disclaimer. The specification, as altered by the disclaimer, then proceeded as follows (a).

"The operation of the machine having now been explained, and its general principles exemplified by the drawings, I now proceed to explain the several points following, namely:—Where the terms 'liquid' or 'water' are used in this my specification, I mean the same to imply either water or any other liquid not injurious to the materials used in the construction of the machine. In this sense, of course, acids are excepted. I do not confine myself to the use of iron, where other metals or other materials may be substituted. I do not confine myself to the use of pipes or tubes as channels for conveyance of the liquids, but propose to use vessels of any desired configuration. I do not in all cases propose to have a solid shaft passing through and carrying the hollow wheel, but in some cases to dispense with the same, and to cause the hollow wheel to revolve on its

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(a) Some arguments were addressed to the Court, founded on the parts disclaimed, as aiding in construing the other parts: but the Court did not proceed on them; and, as it would require a lengthened statement to render them intelligible, they are omitted in the text; and the specification is given as if it had been amended by altering the original, instead of by filing a disclaimer.

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own hollow shaft, passing through stuffing boxes. In some cases I propose also to dispense with hollow shafts for the wheel, and merely to have an opening at each side of the nave for admitting the liquid. In some special cases I propose to have an entrance for the liquid into the wheel at one side thereof only, and to counterbalance the suction arising therefrom by producing a corresponding degree of suction at the other side, without admitting the liquid at the last mentioned side. Where the term 'suction' is used in this my specification, I mean and intend the same to signify the difference produced by the abstraction or partial abstraction of air from the inside, and the pressure of air externally to the supply pipes. In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes; but in some cases propose to substitute circular discs with a narrow water channel between, and a valve, or flexible valve or valves, on the circumference (a), so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralise the effects of suction by having a corresponding or proportionate degree of suction at each side. Nor do I confine myself to a form, or configuration, or manner of connecting together any other parts of the machine; but I propose to vary the same. In reference to the flexible valves at the ends of the hollow spokes, I prefer to make each of them of two halves or pieces lengthwise, and sewed or otherwise fastened up each

(a) The incoherency of the language arises from the manner in which part of a sentence was disclaimed. In the original specification the sentence stood thus "circumference; and, generally, I propose to construct the wheel of every variety of configuration so long as the same is constructed so as to have". The words in italics were, amongst other parts, disclaimed.

side; by which means they collapse according to their weakest form, and are thereby rendered more air proof. In lieu of the exhausting air pump, the machine may be primed by any more convenient and ready method. In lieu of the stuffing boxes, joints may be made air tight by leather or any suitable means. In some places I propose to place the air tight case in the liquid to be raised, dispensing altogether with the supply pipes. I also propose to place the hollow wheel horizontally, or in any other position as may be desirable.

"Having now explained the manner in which my machine operates, or in which my inventions act, and pointed out that the machinery by which the said inventions act may be varied almost to an indefinite extent in the manner of its construction, I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force; nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force, except only when the same is used as a means of introducing liquids into compressed air.

"Now therefore, First, I claim, as my invention and application, the means of neutralising or diminishing the effects of suction at one side of the wheel, by causing the same degree (or such other proportionate degree as may be required) of suction at both sides thereof, whereby a considerable saving of power is effected.

"Second. I claim, as my invention and application, the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides.

"Third. I claim, as my invention and application, the constructing of machinery for raising and impelling

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water and other liquids, by means of introducing such water and other liquids into compressed air, in virtue of centrifugal force imparted thereto by such machinery, and causing such compressed air to operate as the lifting, raising, impelling or forcing power, to impel such water or other liquid upwards.

“Fourth. I claim the application of the before mentioned inventions, both when all used in combination, or when used severally.”

Appold's pump also was worked by means of centrifugal force applied by means of the revolution of a wheel of a different form from that shewn on the drawings. Evidence was called, to shew that the principle was the same. In the result it was admitted by the plaintiff's counsel that the evidence established that the mode of raising water by the revolution of a hollow wheel was not new, and had indeed been the subject of several patents before that of the plaintiff; and that the wheel was an essential part of the plaintiff's machine as described on his drawings, and in his specification. But there was evidence that the manner in which the wheel was applied in the plaintiff's machine, as so described, was new, and especially that the mode of balancing the wheel by either admitting the water on both sides, or, if it was admitted on one side only, counterbalancing the suction by a corresponding degree of suction at the other side, was new and useful, and formed part of *Appold's* Pump. The plaintiff's counsel contended that, though the elements were old, the patent was good for their combination. The learned Judge declared his opinion to be, that the specification claimed the wheel absolutely, and that, the wheel not being new, the specification was too large. He directed a verdict for

the defendants on the second and third issues, and for the plaintiff on the others.

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Atherton, in the ensuing term, obtained a rule Nisi for a new trial on the ground of misdirection.

Knowles and *Hindmarch* shewed cause (a). It being an admitted fact that the wheel is old, the question comes to be, whether the specification claims it. It is precisely the same question as would have arisen if the evidence had shewn that the wheel was new, and the defendants had now been contending that it was not protected by the specification. The general rule is, that the specification must be taken *primâ facie* to claim the whole of what is described as the patentee's invention, unless there be something to shew that part of the thing described is not claimed. In *Hindmarch On Patent Privileges*, 183, the rule is thus laid down. "But if the specification describes more than the invention itself, it must clearly point out which of the things described are old and which of them are new. And if the subject of the patent privilege be an addition to, or an improvement upon, an old machine or other article, the specification must not describe the whole machine or article without distinguishing between the old and the new parts. For the proviso in the patent requires that the invention shall not only be ascertained, but ascertained with particularity, and it is impossible to contend that an invention is so ascertained by a specification, if it describes without distinction many things which are old, as well as the

(a) The case concluded this day, having been partly heard in this Term, November 21st, and 24th, before Lord Campbell C. J., Coleridge and Wightman Js.

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invention itself." This is borne out by the cases there cited; and the same principle is acted upon in a recent case, *Holmes v. London and North Western Railway Company (a)*. In *Smith v. London and North Western Railway Company (b)*, where the question was whether defendant was liable for pirating a part of the invention, this Court held that each part was claimed by a general claim of the machine described. In the present case the title of the patent is for improvements in machinery "for raising and impelling water." But the only thing in the machine described in the specification which either raises or impels water is the wheel. And in the specification, after describing the whole new and old together, he expressly disclaims some things and claims others. Thirdly, he claims the introduction of water into compressed air, "in virtue of centrifugal force imparted thereto by such machinery." Surely that claims the machinery, that is to say the wheel; for nothing else imparts centrifugal force. Lastly, he claims "the before mentioned inventions, both when all used in combination, or when used severally." It seems difficult to choose words better adapted for claiming the whole.

Atherton, Hugh Hill and Kemplay, contra. The essence of the plaintiff's invention is the mode of counter-acting certain defects in a well known machine, namely, the wheel for raising water by centrifugal force. This is effected by combining certain machinery with the wheel: the combination is admitted to be new; and nothing more is claimed. The wheel, until combined

(a) 22d November 1852, Common Pleas. 22 L. J. C. P. 57.

(b) Ante, p. 69.

with this new machinery, was put out of equilibrium by the vacuum which was left on one side only: this defect is obviated by producing a vacuum on the other side. It is undoubtedly true that, if a specification includes what is old as well as what is new, the patentee must be taken to claim all, unless he makes it appear that he does not claim that which is old. [Lord Campbell C. J. Unless he makes that *clearly* appear.] That is the rule: but no particular form of words is necessary for the purpose. This specification, taken with the disclaimer, satisfies that rule. It distinctly points out that there is no claim for the application of machinery for raising water by centrifugal force except where the same is used for introducing the liquid into compressed air. It is not suggested, on the other side, that this application of compressed air is other than new. Then the first claim is confined to the preservation of the equilibrium which would be disturbed by suction on one side, which is to be effected by applying suction on the other side, as described before. The second claim is also limited to what is indisputably new, the introduction of the water on both sides. In the third claim, the essential part is the use of the compressed air. It is true that the water is to be introduced into the compressed air by centrifugal force; but, when this is taken in connection with the preceding express disclaimer, the result manifestly is that the claim is, not for the means of introducing the water, but in respect of that into which the water is introduced. [Lord Campbell C. J. If the wheel had been new, would you not, under this claim, have been entitled to insist that your patent was infringed by any one who used the wheel?] If the wheel was used for the purpose of introducing the water

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into the compressed air; not otherwise. The previous disclaimer would destroy the claim for any but that particular combination. And this distinguishes the case from *Holmes v. London and North Western Railway Company* (a), where the machine was so described that it was not possible to distinguish what was old from what was new. The same remark applies to the authorities referred to in the passage which has been cited from Mr. *Hindmarch's* work. The attempt on the other side seems to be to shew that the wheel is the essential part of the whole machine: and it is so, in some sense: but the claim is for the improvement in its application. Suppose a mode of diminishing the friction of an ordinary carriage wheel were invented: that might be claimed in a patent without claiming the invention of the wheel itself: and this might be done by language analogous to that of the specification in question. So if a patentee were the first to apply wheels to railways: he might support a specification in which he said that he did not claim for the use of wheels to support carriages except where they were applied to railways. The fourth claim is for "the before mentioned inventions, both when all used in combination, or when used severally." The effect of this of course depends upon the sense in which the word "inventions" has been before used. But the specification explains that the wheel for raising water by centrifugal force is not claimed as an invention.

LORD CAMPBELL C. J. This rule must be discharged. It is quite clear that the patentee has described the

(a) Ante, p. 964, note (a).

wheel as part of the machinery for raising and impelling water. That is so, both in the description and the diagram. Then it was proved, and is now admitted, that the wheel is not new. That being so, the claim is *primâ facie* bad, because *primâ facie* all must be taken to be claimed which is described as part of the machinery. It then lies on the patentee to shew that he has clearly pointed out what is not new; for the rule is that this must be done clearly. I am of opinion that there is nothing to shew that the wheel is not comprehended in the claim. I do not think that the words of the disclaimer, which precede the four claims, amount to any thing like a clear disclaimer of the wheel. But, when we come to the third and fourth claims, we find that the wheel is directly claimed. As to the third, the wheel clearly is a part of the "machinery for raising and impelling water" into the compressed air: it does so "in virtue of centrifugal force imparted thereto by such machinery." Then the fourth claim includes "the application of the before mentioned inventions, both when all used in combination, or when used severally." Had the wheel been new, and the plaintiff had been suing for the infringement of this patent by the mere use of such wheel, this fourth claim would have furnished him with a most powerful argument to shew that the patent was infringed: and the action would have clearly lain, according to *Smith v. London and North Western Railway Company (a)*. Even if this is not so, the exclusion is at least equivocal; and that is not enough to protect the specification: the law on this point is well explained in *Holmes v. London and North Western Railway Company (b)*.

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(a) *Ante*, p. 69.(b) *Ante*, p. 964, note (a).

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COLERIDGE J. I also am of opinion that this rule must be discharged. What does the patentee claim affirmatively, and what does he disclaim? He says that he does not claim the application of machinery for raising water by centrifugal force, except only when it is used as a means of introducing liquids into compressed air. He does therefore claim it when it is so used. Then, that being the claim, what is the rule of law? I will take it as well expressed by Mr. *Atherton*: if a specification includes what is old as well as what is new, the patentee must be taken to claim all, unless he clearly makes it appear that he does not claim that which is old. Indeed this rule might be perhaps modified somewhat in favour of the patentee: for, if he had occasion to introduce a hinge into his machinery, it would be absurd that he should point out the hinge as not new. But here, among the things used as part of the machinery, is the wheel. Does he treat that as an old invention, such an invention as was too notoriously old to require disclaimer? On the contrary, we find an elaborate description of the wheel; and it is introduced into the patent as one of the things necessary to make up the machine. Now we have heard three very ingenious arguments in defence of the specification: yet in no one of them was the counsel bold enough to address himself to the argument that any one reading this patent would think himself debarred from the use of the wheel unless he happened to know that it was old. Therefore, according to Mr. *Atherton*'s own test, the claim comprehends too much.

WIGHTMAN J. It clearly appeared that the plaintiff claimed a combination of machinery, some of which was

old and some new. He was then bound carefully to shew that he did not claim what was old. Here the invention, as described, would no doubt include all the wheel unless there was something to shew the contrary. Looking at the specification, the wheel is the primary part of the machine. Then it says: "in reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes; but in some cases propose to substitute circular discs" &c.; thus explaining that the patentees' construction of the wheel is to vary under particular circumstances. Now it is agreed that the wheel is not new: can it be said that the specification shews it is not so? Look, in the first place, to what the patentee says he does not claim: it comprehends nothing shewing that the wheel is disclaimed. The wheel is not claimed, indeed, in the first two items of the claim: but in the third he claims the constructing of machinery for impelling water into compressed air in virtue of centrifugal force. A person looking at the diagram would clearly interpret that claim as comprehending the wheel. I have heard no answer to this. On the authority of the cases cited, I cannot doubt that the claim is too large.

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EARLE J. I did not hear the whole of the argument, and therefore abstain from pronouncing an opinion.

Rule discharged.

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Friday,
November 25th.

DOE, on the demise of RALPH WILLIAM LEES,
against The Reverend JOHN FORD, GEORGE
FORD, THOMAS BOULTON and HANNAH his wife,
JOHN HENRY CLIVE, ESTHER BEECH, RICHARD
SUTTON, and JOSEPH ALLEN and ESTHER his
wife.

By marriage
settlement, *C.*,
the husband,
in considera-
tion of the
intended mar-
riage and of
the fortune of
S., the wife,
to which *C.*
was to become
entitled on the
marriage, re-
leased land to
the use of
himself in fee
until the mar-
riage; and,
after the mar-
riage, to the
use of himself
for life; re-

EJECTMENT for lands in *Staffordshire*. By con-
sent, and order of *Wightman J.*, a case was stated
for the opinion of the Court. The facts fully appear
from the following statement, which is taken from the
judgment of *Crompton J.*, after mentioned.

"This was an action of ejectment, in which a special
case was stated by consent for the opinion of the Court.

"The question arose on the construction of a settle-
ment made on the marriage of *Lydia Sutton* with *John
Clarke*, by deeds of lease and release, dated 24th and
25th days of *August* 1803.

remainder to trustees to preserve contingent remainders; and, after the decease of *C.*, in case *S.* should survive him, to the use of *S.* for life; remainder to trustees to preserve contingent remainders; and, after the decease of the survivor of *C.* and *S.*, in case there should be only one child of the marriage then living, and no other child then dead leaving issue, to the use of such child in fee; but, in case there should happen to be more than one such child living at the decease of the survivor of *C.* and *S.*, or any child or children then dead leaving issue, then to the use of all such children of *C.* and *S.* and such children's children, respectively, for such estates as *C.* and *S.* should jointly appoint, and, in default of such appointment, as the survivor should appoint; and, in default of such appointment, to the use of all the children of the marriage as tenants in common and of the heirs of their respective bodies, with cross remainders; and, "for default of all such issue," to the use of four brothers and sisters of *S.* as tenants in common in fee.

S. survived *C.*: there were two children of the marriage, of whom both died, without leaving issue, in the lifetime of *S.* No appointment was made.

Held: by Lord *Campbell C. J.*, *Coleridge* and *Wightman Js.*, that the remainder to *S.*'s brothers and sisters took effect, as it was not a limitation in remainder after the determination of the estates given to the children as tenants in common in tail by the limitation immediately preceding, but was an independent limitation to take effect in case there were, at the time of the death of the survivor of *C.* and *S.*, no issue in whom any of the previous limitations could vest.

Crompton J. dissente.

“By the release, in consideration of the intended marriage, and of the wife's fortune, amounting to 1200*l.*, which the husband was to become entitled to on the marriage, *John Clarke*, the intended husband, granted and released the premises in question to *Hugh Ford* and *William Sutton* and their heirs, habendum to them, their heirs and assigns, to the use of *John Clarke*, his heirs and assigns, until the marriage; and, after the solemnization of the marriage, to the use of *John Clarke* for life, with remainder to *Ford* and *Sutton* and their heirs during the life of *John Clarke*, to support contingent remainders; and, from and after the decease of *John Clarke*, in case *Lydia Sutton* should survive him, to her use for life, remainder to trustees to preserve contingent remainders; and, after the decease of the survivor of *John Clarke* and *Lydia Sutton*, in case there should be *one child only*, whether son or daughter, of the marriage, then living, and no other child of the marriage should be *then dead leaving issue*, to the use of *such child in fee*; but, in case there should happen to be more than one such child living at the decease of the survivor of them, the said *John Clarke* and *Lydia Sutton*, or any child or children of them should be then dead leaving issue, then to the use of all and every one or more of such children of *John Clarke* and *Lydia Sutton* and such children's children respectively, for such estates, interests and proportions as the husband and wife should jointly appoint; and, in default of such appointment, as the survivor of the husband and wife should appoint, by deed or will; and, in default of such appointment, to the use of all the children of the marriage, share and share alike, as tenants in common, and of the several and respective heirs of the several and respective bodies

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of all such children lawfully issuing ; and, if one or more of such children should happen to die without issue of his or her bodies or body, then, as to the original part or share, or parts and shares, of such child or children whose issue should so fail, as well as to subsequently accruing parts and shares, to the use of the remaining and others of the said children, if more than one, and the heirs of their respective bodies, equally to be divided between such remaining and other children, share and share alike, as tenants in common ; and, if there should be but one such remaining or other child, then to the use of such child, and the heirs of his or her body ; and, for default of all such issue, to the use of the said *William Sutton* and three other persons, the four being brothers and sisters of *Lydia Sutton*, as tenants in common in fee.

“ There was issue of the marriage, *Ann Clarke*, who died in the year 1814, under age and without having been married, and *John George Clarke*. *John Clarke*, the settlor, died in the year 1825, intestate, leaving his widow *Lydia Clarke* and his son *John George Clarke* him surviving. *John George Clarke* died intestate, without having been married, in 1851, in the life time of his mother *Lydia Clarke*, who died later in the same year 1851. The lessor of the plaintiff was the heir at law both of *John Clarke*, the settlor, and of *John George Clarke*, his son.

“ No appointment was ever made under the settlement.

“ The defendants represent the four persons in whose favour the ultimate limitation in the settlement was made.”

The question for the opinion of the Court was stated

to be: Whether, in the events which happened, the limitation in the hereinbefore stated indenture of settlement to the use of *W. Sutton, A. Mycock, H. Ford* and *M. Catton*, and their respective heirs and assigns, took effect.

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If it did, a *Nolle prosequi* to be entered immediately after the decision of the case or otherwise as the Court may direct: but, if the above mentioned limitation failed of effect, judgment to be entered for the lessor of the plaintiff.

The case was argued in last *Hilary* Term (a), and again in this Term (b), by *Rudall* for the plaintiff and *Phipson* for the defendants.

The points are so fully stated, in the following judgments, as to render a report of the arguments unnecessary.

Cur. adv. vult.

There being a difference of opinion on the Bench, the learned Judges now delivered judgment seriatim.

✱

CROMPTON J., after stating the effect of the case (as *Crompton J. antè*, p. 970), proceeded as follows.

The question was, Whether the ultimate limitation to the parties whom the defendants represented depended on the contingency annexed to the preceding limitation.

The plaintiff contended that this ultimate limitation (as well as all the limitations after that to the only child in fee if there were only one child of the marriage and no issue of any child living at the death of the survivor

(a) *January 25th, 1853.* Before Lord Campbell C. J., Coleridge, Wightman and Crompton Js.

(b) *November 15th, 1853.* Before the same Judges.

1853. of husband and wife) was contingent *on the event of there being more than one child of the marriage living at the death of the survivor, or of any child or children of the marriage being then dead leaving issue*; and that, in the event which happened, of there being no child or children or issue of child or children of the marriage living at the time of the death of the survivor of the husband and wife, this limitation never took effect. And I am of opinion that this is the true construction of the settlement.

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The deed provides that, after the life estates, the premises in question were, in the one event of there being one child only living at the death of the survivor, to go to such one child in fee, and that, in the other event of there being more than one child, they were to go, subject to the powers of appointment, to the children as tenants in common in tail, with remainder, as I construe it, to four of the wife's relations in fee.

The general rule on this subject with respect to wills appears to me to be correctly stated in the passage in 1 *Jarman on Wills*, 752, 3, to which we were referred in the course of the first argument. "When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear

not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them." The present case appears to me to fall within the general rule as to the contingency affecting the estate in remainder, and not within the exceptions stated in the same book, which are (a): "First, where the words of contingency," on which the particular estate is to arise, "are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others;" as in the case (b) where the testator stated that his sister would want nothing unless she survived her husband, and the contingency was therefore plainly meant to affect her life estate only, and not to affect the ulterior limitations. And, secondly (a), "where the ulterior limitations do not follow such contingent estate, in one uninterrupted series, in the nature of remainders, but assume the form of substantive independent gifts. As, in the case of *Lethieullier v. Tracy* (c)," where the words "Item, I give and devise" were thought to evince an intention of separating the devise in question from the preceding contingent limitations.

I do not think that the present case can fall under either of these exceptions. The limitation to the wife's relations seems to me to be the limitation of a re-

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(a) 1 *Jurman on Wills*, 754.(b) *Horton v. Whittaker*, 1 T. R. 346.(c) 3 *Atk.* 774.

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mainder following the preceding contingent estates, in the usual course, and in the form of a remainder, without assuming the form of an independent gift; and I see no sufficient expression of intention to separate the remainder from the contingency upon which the particular estate is to arise.

It was suggested that the words "for default of all such issue" must be taken to mean "on failure of all the preceding limitations:" but I think that the expression, as used in this deed, must be construed as referring to the failure of the issue in tail. Estates tail have before been given to *all* the children and the heirs of their bodies; and provision has been made as to survivorship with respect to the children dying and leaving issue; and the word *all* is properly used to shew that *all* the issue of the children, or of the survivors of the children, before mentioned in several places, should fail before the remainder was to come into operation. The words "for default of all such issue" cannot be construed to mean "if all the limitations fail indefinitely;" as this would apply to a general indefinite failure of heirs general, if the first devise in the case of one son took effect: nor can they be limited to the contingency to happen at the death of the survivor of the father and mother; for then the case of the failure of the issue in tail, if the estates tail vested in the children, would be unprovided for, contrary to the clear intention of the deed. Such a construction would leave the ultimate remainder in fee, after the estates tail, undisposed of, and would exclude the wife's relations from taking in the very case in which they seem to me to have been intended to take, that of the children taking estates tail, and the tenants in tail dying without issue in tail. This would be construing the words "for de-

fault of all such issue" as excluding all the various classes of issue, properly so called, which are mentioned immediately before the limitations in question, and which are clearly within and sufficient to satisfy the words "for default of all such issue."

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The only way of giving effect to the case of the defendant, as it appears to me, would be by holding that the limitation in question was to operate by way of a third contingency, in the event of neither of the alternative contingencies mentioned in the deed happening; but that, if the second alternative mentioned in the deed happened, it was to vest as a remainder dependent on the estate tail. On this part of the case I have entertained considerable doubt, and wish to express myself with the greatest diffidence, when I find the view I take is opposed to the opinion of the rest of the Court. Very probably, if the settlor had thought of the third contingency, that of there being no child alive at the death of the survivor of the husband and wife, he would have provided for it; but I think that it would be straining the words of this deed to give it the effect above referred to.

The settlor having provided for the two contingencies by the use of the appropriate words "in case there shall be no child" &c., and "in case there shall be more than one child" &c., "at the death of the survivor," in my opinion the words "for default of all such issue" cannot be construed, without violence, to apply to the third contingency, and to mean "in case there should be no child at the death of the survivor," especially in a passage where they naturally refer to *all* the several classes of *issue* of *all* the children preceding the limitation in question, and have an ample meaning if construed to

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refer to such issue. If the settlor had intended to give the ultimate remainder in fee after the estates tail, the words used would be those exactly appropriate to carry out such an intention; and I do not find any expression to satisfy me that we should either overlook the classes of issue to which the words, grammatically and according to their collocation, refer, or, where those classes of issue are sufficient to satisfy the meaning, that we should look to the earlier part of the deed to include the case of an alternative not necessarily or naturally implied in the deed; especially when the settlor has used different and proper words when he described alternatives of the same nature.

I construe the words in question, therefore, as the ordinary limitation, in the usual way of the ultimate remainder in fee after estates tail: and the case appears to me to fall within the rule above adverted to, as to a contingency on which a particular estate is to arise affecting the subsequent limitations by way of remainder, and not to fall within the exceptions to that rule. And I think that the contingency in this case was annexed to the ultimate remainder in fee, as well as to the estate tail of the children; and that, both having failed of effect in the event which happened, the lessor of the plaintiff is entitled to judgment.

Wightman J.

WIGHTMAN J. The question in this case is, what is the construction to be put upon the words "for default of all such issue," used in the settlement, in expressing the contingency upon which the remainder to those whom the defendants represent is to take effect. This being the case of a deed, the construction of the terms

must be according to the apparent intention of the settlor, to be collected from the deed itself.

For the purpose of the present question, the limitations in the settlement may be stated to be: to the settlor for life, remainder to his wife for life, remainder, if only one child living at the death of the survivor of the settlor and his wife, and no child dead leaving issue, to such surviving child in fee; but, if, at the death of the survivor of the settlor and his wife, there should be more than one child living, or a child or children should have died *leaving issue*, then to such surviving child or children, and such childrens' children, as tenants in common in tail, with cross remainders; and, "for default of all such issue," to the persons whom the defendants represent, in fee.

It was contended, for the plaintiff, that the remainder to those represented by the defendants was dependent upon the preceding limitations, and contingent upon their (or one of them) becoming vested; and that the remainder could only take effect in case there had been children of the settlor and his wife, or childrens' children living at the death of the survivor of the settlor and his wife, who took an estate in tail which afterwards failed for want of issue. It was said that, if there had been only one child living at the death of the survivor, and no child of a deceased child, such living child would have taken an estate in fee, and the remainder in question could not have taken effect; and that, therefore, it must depend upon an estate tail taking effect and then failing. It was admitted that if, instead of "issue," the word "children" had been used it might have been different. For the defendants it was contended that the term "for

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default of all such issue," as used in the settlement in question, means, if there should be no issue who could take under any of the preceding limitations: and that, if, at the death of the survivor of the settlor and his wife, there should neither be one child living who could take in fee simple, nor more than one child, or one child and the issue of a deceased child, who could take in fee tail, then the remainder in question would take effect.

Many cases were cited upon the argument; but, as the general principles applicable to the subject were not disputed, it seems to me unnecessary to observe upon the cases, which all turn upon the particular words and expressions which are the subject of each decision, and which are only direct authorities when the very same terms are brought into question (a).

The present case has been twice very ably and elaborately argued: but the impression produced upon my mind upon the first argument still remains: and I have come to the conclusion that the construction put upon the terms of the settlement on the part of the defendants is the true construction; and that the remainder to those whom the defendants represent was not a remainder upon the estate tail, to take effect only in case that estate vested, and dependent upon it, but that it was an inde-

(a) The authorities referred to in argument, besides those mentioned in the judgment, were the following: *Gulliver v. Wickett*, 1 Wils. 105; *Avelyn v. Ward*, 1 Ves. Sen. 420; *Wingrave v. Palgrave*, 1 P. Wms. 400; *Hotchkin v. Humfrey*, 2 Madd. 65; *Davis, lessee of Pierce, v. Norton*, 2 P. Wms. 390; *Doe dem. Vessey v. Wilkinson*, 2 T. R. 209; *Doo v. Brabant*, 4 T. R. 706; *Quicke v. Leach*, 13 M. & W. 218; *Warter v. Hutchinson*, 1 B. & C. 721; *Fearn's Cont. Rem.* 233 &c.; *Luddington v. Kime*, 1 Ld. Raym. 203; *Festing v. Allen*, 12 M. & W. 279; *Toldervy v. Colt*, 1 M. & W. 250; *Denn dem. Radclyffe v. Bagshaw*, 6 T. R. 512; *Jeffery v. Jeffery*, 17 Sim. 26; *Napper v. Sanders*, Hutt. 118.

pendent remainder, to take effect if all the preceding limitations failed by reason of there being no issue living at the death of the survivor of the settlor and his wife who could take under them.

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It is true that, by this construction, there would be no remainder dependent upon the estate tail; and the ultimate fee, upon the vesting of the estate tail, in case it did vest, would be undisposed of: but such a remainder if the estates tail with the cross remainders vested would be of comparatively trifling value; and the object of the settlement seems to have been, in the first instance, to provide for the children of the marriage and their issue; and, if there were none living at the death of the survivor of the settlor and his wife, that the estate should then go to the family of the wife, whose fortune seems to have been the consideration for the settlement.

Upon the whole, it appears to me that the proper construction to be put upon the remainder over to the relations of the wife of the settlor is, that it is not a remainder upon the preceding limitations in tail merely, and depending upon their vesting, but that it is a remainder to take effect upon failure of any issue who could take estates under the preceding limitations: and that the defendants are entitled to our judgment.

COLERIDGE J. It is unnecessary for me to repeat the terms of the settlement, which have been already stated; and I shall, I believe, be able to give, at no great length, the reasons which induce me to think that our judgment ought to be pronounced in favour of the defendants.

Coleridge J.

It will not be disputed that, whether we are construing a will or a deed, our object ought equally to be:

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first, to ascertain from the instrument itself, coupled with the circumstances which serve to apply its language, what was the intention of the party speaking by it; and then to give effect to that intention, so ascertained, unless we are met by any rule of law or, in the case of a deed, by any technical words which prevent us from effectuating that intention. Now, in the present case, after listening attentively to the argument and the judgment of my brother *Crompton*, and to the difficulties which he suggests, I still think, on the balance of the whole, that the deed discloses with sufficient clearness the settlor's intention, and that there is nothing which prevents our giving effect to it.

It is a marriage settlement. *John Clarke* the settlor, it appears, was to acquire absolutely by the marriage his intended wife's maiden fortune, 1200*l*. The settlement was made in pursuance of an agreement, and in consideration of the acquisition of that fortune, and in order to make a suitable provision for her and the issue of the marriage. Accordingly, the limitations follow which have been already stated; and they end with that on which the present question arises, and which is in the following words; "and, *for default of all such issue*," to the use of certain persons named, who were the brother and sisters of *Lydia Sutton*, the wife, and whom the defendants represent as tenants in common in fee.

John and *Lydia Clarke* had two children: *Anne*, who died under age and unmarried in the life time of her parents; *John George*, who survived his father, but died before his mother, intestate and without issue. *Lydia*, the wife, died last. No appointment was ever made. The lessor of the plaintiff is heir at law to *John* and to *John George Clarke*. The defendants represent the

cestuy que uses, named in the deed to take "for default of all such issue."

The question, therefore, is on the effects to be given to these words: are they the last link of a series, all the preceding links of which have failed, and this, being dependant on them, must fail also: or are they an alternative and independent provision, which may and ought to take effect upon the failure of the preceding limitations?

It must be admitted that this limitation follows on the preceding ones, which commence with the first particular contingent estate, in unbroken continuity; and no special purpose is mentioned with reference to it, which contradistinguishes it from them: and, therefore, it was contended that all hinged on the same contingency, and that, failing the first, the last failed also. But it is clear that this, though the general rule, is not an inflexible one. If there be an unbroken series of limitations, commencing with one which depends on a contingency, it is not unreasonable to infer an intention to make the whole consecutive series one and entire, and therefore all depending on the first contingency. If a testator's or a settlor's language shews that, in disposing of a property, a particular contingency has been present to his mind, and that the limitations, one after another, have been framed with a view to the happening or not, as the case may be, of that event, it is reasonable to infer that that was present to his mind as a condition governing the whole; and then it must operate to prevent, or occasion, as the case may be, the arising of the last, equally with the first, or any intermediate, limitation. But this proceeds on intention, not on any technical rule. The decisions will be found to proceed

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upon the examination, in each case, of the language, to ascertain the intention; and therefore I think it needless to go through them. The result seems to me to be, that the links may be separated from each other, and must be, where the language of the instrument leads to the inference that the settlor so intended, and, as I said, no technical rule prevents us from giving effect to it.

Now, looking at the recital (a) and the limitations themselves in the settlement before us, it seems to me that the settlor may be understood as agreeing with his wife: first, that he and she, and then their children, if any, should be provided for; but, if they two should die leaving no child, or child's child living at their decease, then her family should be next considered. He evidently places these as next in succession to his wife and her children: but to make the provision fail because there were no such children is directly inconsistent with this intention; it is to make that very event defeat the limitation to them, upon the happening of which it was intended to take effect. Nay, according to this construction, the limitation in question never could take effect in any event. If there were such surviving child, then the contingency does not occur upon the happening of which alone it was, by the express language, to take effect: and, if there be no such child, then the construction excludes it because of the failure of that first estate. It would seem strange to adopt a rule of construction, the application of which will make the instrument inoperative in any event.

Mr. Rudall almost admitted that his arguments for the plaintiff would have failed, if the words had been

(a) The effect of the recital is stated earlier in this judgment, p. 982.

"for default of all such *children*" instead of "issue." That difference seems to me immaterial here; and, if anything is to turn on a very nice examination of the terms, I would rather say that the settlor, by using the words "for default of *all* such issue," collects all the preceding steps of the series into one, and separates them from that which follows, making the last an alternative to the former.

I am therefore of opinion that our judgment ought to be for the defendants.

LORD CAMPBELL C. J. I am of opinion that the defendants are entitled to our judgment.

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Looking to the deed, I cannot doubt the intention of the settlor to have been, after giving an estate for life to himself and his wife and the survivor, to provide for the ulterior disposition of the property according to the state of the family at the death of the survivor. He seems to have contemplated three contingencies: 1. that there might then be only one child of the marriage surviving, and no child of a deceased child; 2. that there might then be several children of the marriage surviving, or one child and the child of a deceased child; 3. that there might not then be surviving any child of the marriage, or any child of a deceased child. In the first case, the only child was to take an estate in fee. In the second, the surviving child or children, with the heir of the body of a deceased child, in default of appointment, were to take as tenants in common in tail, with cross remainders. In the third, the four brothers and sisters of the wife were to take as tenants in common in fee. I do not think that this last limitation was intended

1853. to take effect as a remainder upon the estate tail. If

Doe dem. there were any child, or the issue of any child of the
LEES marriage alive at the death of the survivor of the husband
v. and wife, I do not think that it was the intention of the
FORD. deed that the wife's brothers and sisters should take any
benefit. The expression "for default of all such issue"
neither contemplates the issue of the one child taking
in fee simple, nor the issue of those who were to take
as tenants in tail. The limitation upon the second
contingency seems to have been framed with a view to
making a provision for all the children of the marriage
and their descendants, and for keeping the whole estate
in the family by means of the cross remainders. But
the ultimate remainder or reversion after the estate tail
does not seem to have been taken into consideration,
and would in truth have been of so little value that a
gift of it to the wife's brothers and sisters was hardly
worth conferring. In consideration of the wife's fortune,
it seems to have been the wish of the husband to leave
the estate to her family, if there should be no issue of
the marriage surviving him and his wife. It is impossible
to suppose that he meant his wife's family to take the
land if, at a remote time, there should be a failure of
the issue of the tenants in tail, and that they should
not take it if the issue of the marriage entirely failed
during the life estate to him and his wife.

Lord
Campbell C. J.

Such being the manifest intention of the settlement,
it may easily be carried into effect, if the last limitation
"for default of all such issue" may be construed a
separate and independent gift, to take effect if, on the
death of the survivor of the husband and wife, there
should not be surviving any issue of the marriage. The

first two contingencies contemplated the existence of issue of the marriage at the death of the survivor of the husband and wife; and the last limitation provides for the third contingency, a *default of all such issue* at that time. This would only be saying what is to take place on the third contingency, if neither of the two former should take effect: such a construction can hardly be said to clash with the rule that, "if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge upon the same contingency" (a). Here I think an intention is expressed with reference to the last limitation, in contradistinction to that which hinges upon the contingency of there being several children of the marriage alive at the death of the survivor of the husband and wife. The creation of the estate tail is very naturally made to depend upon that contingency; but the ultimate limitation in favour of the wife's family is unconnected with it, and naturally depends upon the third contingency, the "default of all such issue."

The dictum of Lord Eldon in *Moody v. Walters* (b) is entitled to great weight, were this case the same as that; but there no violation would have been done to any manifested intention of the settlement, by considering that the contingency of the husband dying without leaving any issue male then born and alive, and leaving his wife with child, extended to the whole line of limitations. This case seems to me to be more like

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(a) 1 *Jarman on Wills*, 753.

(b) 16 *Ves.* 283. 296, 7. See 1 *Jarman on Wills*, 753.

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Lethicullier v. Tracy (a); for, although here we do not find the words "Item, I give and devise &c.," the last limitation seems to me, not in the nature of a remainder upon the estate tail, but a substantive, independent gift, to take effect on failure of the two former contingencies. The deed might have said: "Item, if, at the death of the survivor of the husband and wife, neither the limitation in fee simple to an only child take effect, nor the limitation of an estate tail to several children, by there being no issue of the marriage them surviving, in that case the four brothers and sisters of the wife shall take as tenants in common in fee." But really the words employed seem to indicate the intention of the parties as distinctly.

It has been argued, that to construe "for default of all such issue" "*on failure of all the preceding limitations*" would make the use in favour of the wife's brothers and sisters arise upon the indefinite failure of the heirs general, under the limitation in fee to the only child: but it seems to me quite clear that, if this limitation in fee had once taken effect, an indefinite failure of the heirs general cannot be considered as in contemplation, and the ultimate limitation must have been abortive. The use in favour of the wife's brothers and sisters must arise, if at all, at the time of the death of the survivor of husband and wife, without leaving child or children, or the issue of child or children. Nor do I think that the limitation in favour of the wife's brothers and sisters at all depends upon the failure of the issue of those who are to take estates tail: for, these estates having once

(a) 3 Atk. 774.

vested, the contingency on which the ultimate limitation was to take effect could not happen. They clearly could never take, if there was only one child living at the death of the survivor of husband and wife: and it could not possibly be intended that, if there were several children of the marriage then surviving, the brothers and sisters of the wife should take upon the failure of the issue of such children. There appears to me to be a fallacy in Mr. *Rudall's* argument, in assuming that the ultimate limitation in favour of the wife's brothers and sisters only created a remainder upon the estate tail. In *Doe dem. Watson v. Shipphard* (a), and the other cases he relies upon, the contingency on which the first limitation was to take effect was extended to the subsequent limitations; but the intention of the testator or settlor was fulfilled by the construction adopted; while, in the present case, by the application of the rule the expressed intention of the settlor would be certainly contravened. That intention may, in my opinion, be carried into effect according to the rules of law. Husband and wife taking an estate for life to them and the survivor, with a contingent remainder in fee to an only son surviving his parents, with a contingent remainder in tail if there should be several children surviving, or one child and the child of a deceased child, and a contingent remainder in fee to the wife's brothers and sisters if, at the death of the survivor of the husband and wife, there should not be surviving any child or children of the marriage, or any child of such children, the two former contingencies failed, the

1853.

Doe dem.
LEES
v.
FORD.

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(a) 1 *Doug.* 75.

1853. <hr/> Doe dem. LEES v. FORD.	last has come to pass: and therefore I agree with the majority of the Court in thinking that there ought to be judgment for the defendants.
	Judgment for the defendants.

Lord
Campbell C. J.

END OF MICHAELMAS TERM.

The Court did not sit in banc in the vacation following *Michaelmas* Term.

In the same vacation, *George Atkinson, Esq.*, of the *Inner Temple*, was called to the degree of the coif, and gave rings, with the motto, *Tout temps prist.*

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Held: that stat. 5 & 6 W. 4. c. 50. s. 69., requires the surveyor to execute a conviction under that Act, by pulling down the encroachment though there is no warrant: and that consequently the conviction, though not itself correct, was a defence to this action, as defendant was shewn to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction. *Keane v. Reynolds*, 748.

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racter, in offering the 12,000 shares to the public, guaranteed and promised to the bearers of those shares a minimum annual dividend of 33 per cent., payable at specified times, and that the guarantie and promise should remain in force till the 12s. 6d. should be thus repaid to the bearers. That plaintiff, confiding in the promise, became purchaser and bearer of 2500 of the 12,000 shares at 12s. 6d., and took the same on the faith of the guarantie and promise, and not otherwise, and had fulfilled the engagement on his part: and the time for payment of the 12s. 6d. by the dividends had elapsed, of which defendant had notice: yet defendant had not paid any dividend, nor any part of the 12s. 6d.: and the 12s. 6d. on each share was still unpaid to plaintiff. On demurrer:

Held: that neither privity of contract nor consideration appeared: and that the action did not lie.

2nd count stated that before the representation by defendant after mentioned, defendant and others had formed the Company, as above; that the 12,000 shares were actually offered to the public; that defendant being such promoter and managing director, *intending to defraud, deceive and injure the public*, and to cause it to be publicly advertised that the Company was likely to be a safe and profitable undertaking, and to deceive the public who might become purchasers of the 12,000 shares, and induce them to become purchasers, falsely, fraudulently and deceitfully caused it to be publicly advertised, by a prospectus issued by defendant as such director, that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares a minimum annual dividend of 33 per cent., and that the guarantie should remain in force till the 12s. 6d. should be thus repaid to the shareholders; the dividends to be payable at specified times: that defendant, by means of the said false, fraudulent and deceitful pretences and representations, wrongfully and fraudulently induced plaintiff to become, and plaintiff by reason thereof actually became, purchaser and bearer of 2500 of the

12,000 shares at 12s. 6d.; and by means of being so deceived, was induced to and did pay 12s. 6d. per share: Whereas the statement was false and fraudulent, to the knowledge of defendant, and defendant had no ground for offering such guarantie to the public, as he well knew: by means of which plaintiff lost the money paid for the shares. On demurrer:

Held: that the damage to plaintiff was sufficiently shewn to be the direct result of defendant's fraud to entitle plaintiff to recover against defendant as for a tort. *Gerhard v. Bates*, 476.

2. For malicious procurement of breach of contract by a stranger to the contract.

1st and 2nd counts of declaration, by lessee of a theatre: for maliciously procuring *W.* (who had agreed with plaintiff to perform and sing at his theatre and no where else for a certain term) to break her contract and not to perform or sing at plaintiff's theatre, and to continue away during the term for which *W.* was engaged. 3d count, averring that *W.* had engaged with plaintiff to be, and had become and was, plaintiff's dramatic artiste for a certain term, and complaining that plaintiff maliciously procured her to depart out of her said employment during the term. On demurrer:

Held, by *Wightman, Erle* and *Crompton, Js.*, that the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only in fieri, provided the procurement be during the subsistence of the contract, and produces damage: and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant.

Semble, by the same Judges, that the action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result and did result to the plaintiff.

Coleridge, J. dissentiente, and holding that the action for procuring a third person to depart from his engagement is founded on the Statute of Labourers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was within that statute; and that, in all other cases, the remedy for a breach of contract is only on the contract, and against those privy to it. And that, as a dramatic performer is not a servant, therefore the counts were all bad.

The defendant had, under stat. 15 & 16 *Vict. c. 76. s. 80.*, obtained leave to plead and demur also. On an application to postpone the trial of the issues in fact till the issue in law had been finally disposed of in a Court of Error:

Held: that the Court had no power to make such an order; inasmuch as the judgment on the demurrer had disposed of the issue in law, finally as far as regarded this Court. *Lumley v. Gye*, 216.

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The action was brought in the county court; and the following (among other) particulars of demand were stated. "1. For unlawfully entering plaintiff's premises and continuing thereon, and seizing and distraining three cattle of the plaintiff, under colour of a distress. 2. For unlawfully selling three other cattle of the plaintiff's, not distrained." "4. For continuing on plaintiff's premises, and proceeding to sell the plaintiff's cattle, after an abandonment of the distress."

Held that evidence might be given

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of the 4th particular : For that, if any notice was necessary of the cause of action referred to in the 4th particular (and, per Lord Campbell C. J., *Cole-ridge* and *Crompton* Js., *semble* that it was not), the notice given comprehended such cause, *Howard v. Remer*, 915.

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Plaintiff declared on a bond executed by defendant, and set out the condition: which recited that a female, *M. A. H.*, had intermarried with defendant: that, in contemplation of and previously to

the marriage, personal estate belonging to *M. A. H.* was, by settlement, assigned to trustees for the benefit of *M. A. H.*, defendant and the children of the marriage; that *M. A. H.* received, before her marriage, from plaintiff, a principal sum of 300*l.*, to the interest of which plaintiff was entitled for life, *M. A. H.* being entitled to the principal on plaintiff's decease; that the 300*l.* was paid to *M. A. H.* with plaintiff's consent, on condition that the interest should be regularly paid to plaintiff; that, to effect such purpose, defendant and *M. A. H.* had agreed to execute to plaintiff the bond in manner after appearing; and the condition was that, if defendant or *M. A. H.* should during plaintiff's life pay plaintiff the interest, and in case of plaintiff's death between days of payment pay a proportion of the interest to plaintiff's executors, the bond should be void. Breach: non-payment of the interest.

Plea: That, before the making of the bond and the marriage, plaintiff was possessed of the 300*l.* for life, and entitled to the interest for life, and to the 300*l.* absolutely, in the event of the plaintiff surviving *M. A. H.*: and that plaintiff did, at the request of *M. A. H.* and defendant, pay and assign to *M. A. H.* the 300*l.* and all plaintiff's interest therein, on condition that *M. A. H.* and defendant should secure to plaintiff an annuity for plaintiff's life, equal to the amount of the interest of the 300*l.*: that *M. A. H.* and defendant, in consideration of plaintiff so paying and assigning the 300*l.*, agreed to secure to plaintiff the said annuity: and the bond, with its condition, whereby the annuity was secured to the plaintiff, was made to plaintiff by defendant and *M. A. H.* in pursuance of the said condition on which the 300*l.* was so paid, and in fulfilment of the agreement; that the bond was made after the passing of stat. 53 *G. 3. c. 141.*; and the annuity was granted on a pecuniary consideration, to wit the payment of the 300*l.*; and no memorial of the bond was enrolled within thirty days: whereby the bond was void.

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The arbitrator awarded in favour of the plaintiff, ordering defendant to pay the costs of the reference and award. On motion to set aside the award, as uncertain and not final, the Court ordered the award to be referred back to the arbitrator, for the purpose of his deciding on certain matters specified in the order. Nothing was said as to costs in this order.

The arbitrator made an amended award, deciding on the matters referred back, confirming his first award in all other respects, and ordering the defendant to bear the costs of the amended award.

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And that the detention was not made legal by the delivery to the keeper, after the arrest, of another warrant upon the same conviction.

These two warrants having been returned to a habeas corpus ad subjiciendum, the Court received an affidavit that the arrest took place on a Sunday, and ordered the prisoner to be discharged from custody under the two warrants.

Before the keeper received the order, another warrant was delivered to him for the imprisonment of *E.* upon his conviction by two justices for not delivering to the council, acting as paving commissioners under a local act, accounts, books, &c. Held: that this, being substantially a proceeding by the same parties, did not warrant the detention.

After the keeper received the order, but *E.* not having been discharged, the sheriff of *S.* lodged with the keeper his warrant, under a ca. sa. at the suit of *H.* against *E.* Held: that *E.* might be lawfully detained under the ca. sa., no collusion appearing between the sheriff or *H.* and the town council. *Eggington's Case*, 717.

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A. was summoned before justices, under stat. 9 *G.* 4. c. 31. ss. 27., 33., for an assault. He did not appear; and the justices, upon proof of service, heard the case, and convicted *A.*: the conviction was drawn in the form given in sect. 35; and by it *A.* was adjudged to forfeit and pay 2*l.* 10*s.*, and 1*l.* 6*d.* for costs; and, in default of immediate payment, to be imprisoned for six weeks unless the sums should be sooner paid: and the conviction directed that the 2*l.* 10*s.* should be paid to *G.*, one of the overseers of the parish within which the offence was committed, and the 1*l.* 6*d.* to the party aggrieved. And directly thereafter, no payment being made, the justices, in the absence of *A.*, and without further summons, issued a warrant of commitment for default of payment.

Held: that the commitment was legal.

By charter of *Ed.* 4. the Crown granted to the abbot and convent of *S.* the right of appointing their own justices, with power of oyer and terminer for all felonies, trespasses and misdemeanours occurring within the Liberty of *S.*, in the county of *H.*, with a non intromittant clause; and that they might have a gaol, under their own government, without interference by other justices or others,

for felons and malefactors taken within the Liberty, till such were delivered by due course of law.

Admitted: that the power to appoint justices was put an end to by stat. 27 *H.* 8. c. 24. (A.D. 1535), and that the justices created for the Liberty under that statute by the Crown had no exclusive jurisdiction over felonies, trespasses and misdemeanours.

Stat. 31 *H.* 8. c. 13. gave the Crown the franchises appertaining to the then dissolved abbeys, or those that should thereafter be dissolved, as largely as the abbots ought to have held the same at the time of their coming to the King's hands. Afterwards, 5th December 1539, the abbey of *S.* was dissolved. Afterwards, by stat. 32 *H.* 8. c. 20. it was enacted that the same liberties, franchises and jurisdictions which the late owners had exercised within three months before the abbeys came to the King's hands should be revived in the King's hands.

Admitted: that these statutes did not revive, in the justices appointed by the Crown for the Liberty, the exclusive jurisdiction given by the charter of *Ed.* 4.

By charter of 9 *Ja.* 1. the Crown granted to *W.* in fee all the Liberty of *S.*, and its rights, as fully as any abbot of the monasteries, or as any king, enjoyed them.

Admitted: that this did not give to the justices of the Liberty exclusive jurisdiction.

Admitted, therefore, and, agreed to by this Court: that justices of the county, having by the terms of their commission jurisdiction as well within liberties as without, might, sitting in the county and out of the Liberty, convict under stat. 9 *G.* 4. c. 31. s. 27. for an assault committed within the Liberty.

Within the Liberty was a house of correction, supported exclusively by rates raised in the Liberty. The Liberty did not contribute to the county rate. The keeper was appointed by the justices of the Liberty. Quarter sessions were held within the Liberty at which offences committed within the Liberty were tried.

Held: that justices of the county might, sitting out of the Liberty and in the county, commit a party convicted, under stat. 9 G. 4. c. 31. s. 27., of an assault done within the Liberty, to the house of correction of the Liberty.

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the bill with the bank and indorsed it
to them; they rediscounted the bill
and indorsed it to the rediscounter.
On the maturity of the bill, it was
presented by the holder at the bank
along with several other bills payable
there, all of which bore the bank's
indorsement. The bank paid the
amount of the whole without any
indication of whether they paid as
indorsers or as agents for the accep-

tors. The account of the acceptor of
this bill was at this time overdrawn;
he stopped payment on that day; and,
on the next, notice of dishonour was
given by the bank to plaintiffs, and
they were debited with the amount.
It was left to the jury to say, whether
the bank paid the bill on their own
account as indorsers, or as agents of
the acceptor. The jury found that
they paid as indorsers; and the bank
had a verdict.

Held: that the question was pro-
perly left: that the bank had a right
to pay the bill as indorsers, reserving
to themselves time to inquire, whether
they would honor the bill or not; that
it was a question of fact whether they
intended to do so; and that there was
no obligation on them to inform the
holders in what capacity they paid.
Pollard v. Ogden, 459.

II. Obligations to customer.

1. How soon they are to inform him
that a bill is dishonoured, 459.
Ante, I.
2. Right to reasonable time to look
into accounts, 459. *Ante*, I.
3. As to informing him in what ca-
pacity they take up a bill, 459.
Ante, I.

BANKRUPT.

I. Act of bankruptcy: assignment of
property.

1. Notwithstanding pressure, if such
as to delay creditors.

G., a farmer, conveyed all his farm-
ing stock and goods to *S.* by bill of sale,
by way of security for about 900*l.*, with
a power of sale. The property com-
prised in the bill of sale was of about
the value of 2,800*l.*; and there was a
trust for *G.* of the surplus of the pro-
perty comprehended in the bill of sale,
which was the whole of *G.*'s property,
with the exception of two shares in a
joint stock bank, of the value of 17*l.*
10*s.* each. *S.* seized and sold enough
of the stock to pay the amount secured.
G. was declared a bankrupt, as a
banker. The bill of sale was bona

fide given under pressure; and the trade of the bank was not affected by giving it. On trover by *G.*'s assignees against *S.*, issues being joined on pleas of Not guilty and Not possessed, and the Judge at Nisi prius having ruled that these facts were evidence on which the jury might find a verdict for the plaintiff:

Held, by the Exchequer Chamber, on a bill of exceptions, that the necessary consequence of an assignment of what is substantially all the trader's property is to delay his creditors, and that the existence of a resulting trust, and of a substantial surplus, does not prevent its having that effect; and that a conveyance necessarily delaying a trader's creditors is an act of bankruptcy, though it has not the effect of stopping his trade; and that a transaction, being itself an act of bankruptcy, is not protected, though made with a party who has no notice of the circumstances making it an act of bankruptcy; and consequently that the facts in this case were evidence on which the jury might find for the plaintiffs, and the direction was therefore right. *Smith v. Cannan*, 35.

2. Creditors delayed notwithstanding resulting trust, 35. *Ante*, 1.
3. Not necessarily of trade property, 35. *Ante*, 1.
4. Not necessarily such as to effect stoppage of trade, 35. *Ante*, 1.
5. Effect of substantial surplus, 35. *Ante*, 1.

II. Trading.

What amounts to carrying on a trade. 512. *Contract*, II. 1.

III. Effect of proof as an election.

Costs on certiorari: principal and surety.

An indictment for a nuisance was removed into this Court by certiorari, at the instance of defendant, who entered into recognizance, with two manucaptors, under stat. 5 & 6 *W. & M.* c. 11. s. 2. Defendant was convicted.

On his being called up for judgment,

an order was made by consent, respiting the judgment until a report should be made, as to the nuisance, by a referee, and ordering the costs to be taxed. The costs were taxed; but the referee refused to undertake the reference. The defendant not having, on demand, paid the taxed costs, the prosecutors issued a *fi. fa.*, which proved unfruitful: afterwards the defendant became bankrupt: and the prosecutors proved the taxed amount of costs under the bankruptcy; upon which a dividend of 2s. 10d. was declared.

After this, defendant was called up for judgment and sentenced: the prosecutors thereupon took out a side bar rule for taxation; and the allocatur was given for a sum including the amount formerly taxed, with a small addition for the costs of the last bringing up for judgment. Defendant and his bail not having paid these costs, a motion was made to attach him, and to estreat the recognizances.

Held that, as against defendant, the rule must be discharged, the proof in bankruptcy having been made for substantially the same sum as that in the last allocatur.

But that, as against the bail, the facts supplied no answer: and the rule against them was made absolute. *Regina v. Hills*, 176.

IV. Protected transactions

Not a *bonâ fide* conveyance which is itself an act of bankruptcy, 35. *Ante*, I. 1.

V. Delay of creditors.

What constitutes, 35. *Ante*, I. 1.

VI. Notice of act of bankruptcy.

When not essential, 35. *Ante*, I. 1.

BAR.

By lapse of time, 641. *Limitation*, I. 1.

BARON AND FEME.

I. Absence of husband.

BASTARD.

1. Under sentence of transportation, 546. *Bastard*, I.

2. Desertion; settlement by estate, 803. *Poor*, X.

II. Bastardy.

Liability of putative father notwithstanding coverture of mother, 546. *Bastard*, I.

BASTARD.

I. The mother.

A married woman.

Under stat. 7 & 8 *Vict. c. 101. s. 3.*, justices may make an order of maintenance on the putative father of a bastard child born of a married woman, where non-access of the husband can be shewn. And, in the order, the mother may be described as a single woman.

So held, in a case where the husband was absent under sentence of transportation.

Held also, that the liability of the putative father, under the order, was not put an end to by the husband and wife having renewed cohabitation.

Where justices, under the above circumstances, refused to issue a warrant of distress for arrears of the sum ordered to be paid, assigning as their reason that the putative father was discharged from the order by the husband's return and cohabitation, the Court made absolute a rule for ordering them to issue the warrant, holding that this could not be considered as a refusal made in the exercise of the discretion of the justices. *Regina v. Pilkington*, 546.

II. Duration of liability of putative father.

Notwithstanding mother's renewed cohabitation with her husband, 546. *Ante*, I.

BENEFICE.

I. Proceedings for non-residence.

1. Monition: previous warning not necessary.

BILL OF LADING. 1001

In proceedings, under stat. 1 & 2 *Vict. c. 106.*, for the sequestration of a benefice for non-residence, it is not necessary that the Bishop's monition, under sect. 54, should be preceded by a citation or other warning to the incumbent.

Where the incumbent, in answer to such monition, sends a return assigning an excuse for non-residence which the Bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the Bishop to make an order upon the incumbent to return into residence within thirty days.

Where the incumbent, being served with such order, sends to the Bishop, upon affidavit, an excuse for not obeying the order, which the Bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the Bishop to sequestrate the benefice after the lapse of the thirty days.

Under sect. 58 a benefice becomes void if it remain, for the space of a year, under sequestration for non-residence; the year commencing from the date of the decree of sequestration; the case not falling within sect. 120, which provides that for all purposes of the Act, except as therein otherwise provided, the year shall commence on 1st *January* and be reckoned to 31st *December*, both inclusive. *Bartlett v. Kirwood*, 771.

2. What a sufficient hearing to ground order to reside, 771. *Ante*, I.

3. What a sufficient hearing to authorize sequestration, 771. *Ante*, I.

4. Avoidance by remaining under sequestration, 771. *Ante*, I.

II. Computation of time.

When from the date of the decree, 771. *Ante*, I. 1.

BILL OF EXCEPTIONS.

Construction, 822. *Carrier*, II.

BILL OF LADING.

Receipt and retention of, 364. *Vendors*, II. 1.

BILL OF SALE.

Page 35. *Bankrupt*, I. 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Acceptance or making as a surety only.

1. What must be shewn in a plea of time given to principal.

To an action by the payee of a joint and several promissory note, against one of the makers, defendant pleaded that he made the note as surety for the other maker *G.*, and that there had never been any other value or consideration for defendant's making the note; all which had always been well known to plaintiff: that, after the note was due, and before the commencement of the action, and after payment had been demanded of *G.*, *G.* was indebted to plaintiff in 1100*l.*, which included the amount of the note; and plaintiff agreed with *G.*, without defendant's leave, to give time to *G.* for that debt.

Plaintiff traversed the given time; and the issue was found for defendant.

Held: That, in the absence of any allegation, in the plea, that plaintiff, when he took the note from defendant, agreed to receive it from defendant in the character of surety only, the plea was bad, and plaintiff was entitled to judgment non obstante veredicto. And, *per Curiam*, *quare* whether or not such an allegation would have made the plea good.

Leave to enter a suggestion, under stat. 15 & 16 *Vict. c. 78. s. 143.*, will not be granted unless the applicant shews by affidavit sufficient probable grounds for believing that the final decision on the suggestion will be in his favour.

So held, where the application was to supply the allegation as to which the Court doubted, as above. *Manley v. Boycott*, 46.

2. Whether time given to principal is a good defence at law, 46. *Ante*, 1.

II. Material alteration.

1. By inserting rate of interest.

A promissory note was made, payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added, in the corner of the note, "interest at six per cent. per annum."

Held: that this addition materially altered the contract; and that the holder could not recover on the note against the maker. *Warrington v. Early*, 763.

2. In what part of the instrument, 736. *Ante*, 1.

III. Stamp.

Unstamped inland bill sold as a foreign bill, 849. *Post*, IV. 1.

IV. Sale and purchase of bills.

1. Credit to whom given, 89. *Post*, V. 1.

2. Where bill sold as a foreign bill turns out to be an inland bill void for want of stamp.

An unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect.

Held: that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold. Though it would have been otherwise (the sale being without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill. *Gompertz v. Bartlett*, 849.

3. Sale without recourse, 849. *Ante*, 1.

V. Holder for value.

1. Bill received and held on account of a debt due from the principal of the party remitting.

Assumpsit by payees of a foreign bill against drawers. Plea; that the bill was sold by defendants to *C.* on one foreign post day, on the terms of being paid according to usage on next foreign post day; that *C.* purchased the bill as agent for *H.*, and remitted the bill to plaintiffs as such agent, and plaintiffs received it for collection for *H.*; that, before the next foreign post day, *C.* failed, and did not pay the price; that there was no value as between *C.* and *H.*, or as between *C.* and plaintiffs; and that plaintiffs were holders without value. *De injuriâ.*

On a case, on which the Court were to draw inferences of fact, it appeared that *C.* was a *London* merchant, and plaintiffs *Paris* merchants, both correspondents of *H.*, an *American* merchant. *H.* was indebted to both *C.* and plaintiffs. Plaintiffs wrote to *H.* for a remittance. *H.* sent to *C.* a bill on *London*, for an amount exceeding *H.*'s debt to *C.*, desiring him to realize it, pay himself his own account, and remit the balance to plaintiffs. *C.* realised the draft, credited *H.* with the proceeds, and bought of defendants, in the ordinary course in *London*, a bill, for the amount of the balance due to *H.*, which bill was to be drawn by defendants payable to plaintiffs' order, to be delivered by defendants to *C.* in *London* on one foreign post day, and paid for to them by *C.* on the next. The bill in question was drawn, and delivered to *C.*, and sent by him to plaintiffs, who, by letter to *C.*, acknowledged the receipt on account of *H.*, and stated that they would advise *H.* thereof. Before the next foreign post day, after the delivery of the bill to *C.*, *C.* failed. Defendants never received anything for their bill: they directed the drawee not to honour it; and it was dishonoured accordingly. Afterwards *H.* paid plaintiffs in full. The action was in the name of plaintiffs for *H.*'s benefit.

Held, that plaintiffs were holders for value, as they held the bill at the time of its dishonour on account of the

debt from *H.* to them; and that the subsequent assignment of the equitable interest to *H.* did not affect plaintiffs' right to sue at law.

Held, also, that *H.* had given full value for the bill to *C.*: that, as between *H.* and defendants, *C.* could not be considered as agent for *H.* in buying the bill; and that the credit given by defendants for the price of the bill was given to *C.* as buyer, and not as agent for *H.*

A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit, as purchasers, for what he buys in the home market on their account. *Poirier v. Morris*, 89.

2. After payment by the party on account of whose debt it was held, 89. *Ante*, 1.

VI. Insolvent holder.

Revesting in insolvent on discharge by detaining creditor.

Assumpsit by indorsee against maker of a promissory note. Plea: That, before indorsement, the indorser, being in actual custody for debt, petitioned the Insolvent Debtors' Court; and by a vesting order all his property was vested in the assignee. Replication: That, after the appointment of the assignee, and before the indorsement by the petitioner, he was discharged from custody by his detaining creditor, without any adjudication by the Court. Demurrer. Held, that, on the petitioner being so discharged from actual custody, the property in the note revested in him under stat. 1 & 2 *Vict.* c. 110.; and consequently that the replication was good. *Grange v. Trickett*, 395.

But see 406. *Debtor*, II. 1.

VII. Indorser.

Banker, who is also agent for acceptor, to pay the bill, 459. *Bank*, I.

VIII. Payment: in what capacity.

By banker who is both indorser, and the person at whose house the bill is made payable, 459. *Bank*, I.

IX. Pleading.

1. Plea of time given to principal, 46. *Ante*, I. 1.
2. Plea, insolvency of indorser: replication, discharge by detaining creditor, 395. *Ante*, VI.

BISHOP.

Proceedings by to compel residence.

What notice and hearing sufficient, 771. *Benefice*, I. 1.

BONA FIDES.

Bona fide belief of officer that he is acting in execution of statutory powers.

An inspector of weights and measures, under stat. 5 & 6 W. 4. c. 63. s. 28., duly entered a shop to examine weights, measures and weighing machines. He seized and carried away as forfeited a pair of scales, and detained them after being requested to give them up. The owner sued in the county court: when the jury found that the scales were in fact unjust; that they were a weighing machine, and not a weight or measure; and that the defendant bona fide believed that he was acting in pursuance of the Act. Under the direction of the judge, the jury found for the plaintiff. On appeal on a case stating these facts.

Held: that, under stat. 5 & 6 W. 4. c. 63. s. 28., weighing machines are not forfeited though unjust, although weights and measures are: and, consequently, that the defendant was not authorized by that Act to seize the scales.

Held also: that stat. 5 & 6 W. 4. c. 63. s. 39., 40. gives only privileges in pleading, and powers of tendering amends to defendants sued for things bona fide done in pursuance of the Act, but not authorized by it; and that it does not make bona fides in itself a defence. And, consequently, that the decision of the judge of the county court was right. *Thomas v. Stephenson*, 108.

BOND.

I. Set off.

1. To what bonds it cannot be pleaded.

Count on a bond for 100*l.*, conditioned to indemnify plaintiff against certain actions: breach, that plaintiff was sued on one of them, and obliged to pay 9*l.* 10*s.* 5*d.*, and was not indemnified. Plea: set off of an amount averred to be equal to plaintiff's claim; but the plea did not shew what amount was due on the bond. Demurrer.

Held: that set-off could not be pleaded to a bond conditioned for indemnity: and that a plea of set-off to a bond, under stat. 8 G. 2. c. 24. s. 5., is not good, unless it shews what amount is justly due on the bond: and that for both reasons the plea was bad. *Athwood v. Athwood*, 23.

2. When the plea must shew amount justly due, 23. *Ante*, 1.

II. To secure payment of interest.

When it does not require enrolment as the grant of an annuity, 374. *Annuity*, I.

III. Assignment of.

Effect as regards foreign attachment, 605, 625. *London*.

BOROUGH.

I. Parliamentary, 182. *Parliament*.II. Municipal. *Municipal Corporations*.

BREACH.

Of contract.

1. Malicious procurement of, 216. *Action*, I. 2.
2. Before time for performance, 678. *Contract*, IV. 1.

BRIDGE.

Railway bridges, 466. *Mandamus*, II.

BUBBLE COMPANY.

See page 476. *Action*, I. 1.

BUSINESS.

I. What extent of transactions amounts to the carrying on of a business at a place, 512. *Contract*, II. 1

II. Declarations in the course of, 933. *Evidence*, V.

CANCELLATION.

Of charter, 856. *Charter*, I.

CAPIAS AD SATISFACIENDUM.

See *Execution*, IV.

CAPITAL.

False certificate as to paid-up capital, 856. *Charter*, I.

CAPTAIN.

Of merchant ships, 301. *Shipping*, III. 1.

CARGO.

Sale of, 836. *Vendors*, I.

CARRIER.

I. Evidence of special contract.

Consignment after receipt of special notice.

Action against a railway company for not duly carrying fish, from *S.* to *M.*, averred to be received by the defendants at *S.* to be carried as common carriers to *M.* Pleas: 2. That defendants did not receive the fish as common carriers: 3. That defendants received the fish on certain terms set out in the plea. Issues thereon.

At the trial, there was evidence that defendants printed many notices, declaring that they would not carry fish except on terms relieving them from all liability, and declaring also that none of their servants had power to vary those terms; that a parcel of these notices were sent to *S.*, and

served on the fish merchants there, including plaintiff: that they generally threw down the notices; and that plaintiff told the defendants' station master at *S.* that they were not of any use; after which, the fish were sent by the plaintiff by defendants' railway, and were not duly carried. The learned Judge advised the jury, if they were satisfied that plaintiff was served with the notice, to infer, as a fact, that he sent the fish on a special contract embodying the terms contained in it, unless the plaintiff, before he sent the fish, unambiguously dissented from the terms, and the defendants acquiesced in his dissent. Verdict for defendant on the two issues above mentioned.

Held: that the direction was, under the circumstances, right: that stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 4. is confined to public notices; and that the jury might rightly infer, from plaintiff having special notice that the fish would not be taken except on certain terms and that no one had power to vary the terms, and from his afterwards persisting in sending his fish, that he assented to a special contract to carry on these terms; and the defendants were in that case protected by his special contract, under sect. 6. *Walker v. York and North Midland Railway Company*, 750.

II. Duty to have proper servants.

To have sufficient servants to meet ordinary exigences.

Trover, for quicks and plants, against a Railway Company. Plea: Not guilty. On the trial, the Judge ruled that there was sufficient evidence of a conversion by defendants. To this ruling defendants excepted. Verdict for plaintiffs. The bill of exceptions set forth the whole evidence. By this it appeared that plaintiff was a contractor planting hedges for defendants at one of their stations, and was owner of live thorn plants which had been, by leave of *F.*, who was called in the bill of exceptions the general superintendent of the Company, placed in a piece of ground belonging to defendants and close to the station. Plaintiff de-

manded these thorns from the station master, and was referred to *F.*; and *F.*, professing to act for defendants, refused to let the plaintiff remove them. It did not appear distinctly, when or under what circumstances the thorns were brought to the station. The majority of the Judges in the Court of Exchequer Chamber (*Jervis C. J., Pollock C. B., Alderson B., Maule J., Platt B., Williams J., and Talfourd J.*) construed the bill of exceptions as meaning that the thorns had been carried as merchandize on the line, and left in the ground of the defendants with their roots covered as a mode of warehousing them for a reasonable time in such a manner that they might remain alive. *Parke B.* construed the bill of exceptions as, at most, shewing evidence that the thorns had once been carried on the line, and had afterwards been left in the defendants' ground for an indefinite time, for the convenience of the plaintiff as contractor, and not as an incident to the carriage. *Martin B.* doubting whether, on the true construction, the relation of carrier and customer ever existed at all with respect to these thorns.

Held by all the Judges: that it is the duty of a company, carrying on trade, to have on the spot an officer with authority to do for the company all that, in the ordinary exigencies of their business, might require to be done promptly: that, in this respect, there is no difference between an ordinary partnership and a corporation: that there was sufficient evidence that *F.* had authority to this extent from the defendants, and that it was not necessary to shew any authority under seal. Held also, by all the Judges, that to give up, or refuse to give up, on demand, goods left with the defendants in the course of their trade as carriers, was an act within the scope of such authority; and that, on the construction put on the bill of exceptions by the majority of the Judges, these thorns were so left, and therefore there was evidence of a conversion by defendants.

Parke B. was of opinion that the implied authority of such an officer is

strictly confined to acts within the scope of the Company's ordinary business, and that there was no evidence that *F.* had a more extensive power: that goods warehoused for a short time, as a custody ancillary to their carriage, would have been in the possession of the Company in the course of their ordinary trade; and to refuse to deliver those was within the scope of *F.*'s authority; but that it was beyond the *prima facie* authority of *F.* to allow the thorns to be planted for an indefinite time for plaintiff's convenience. *Parke B.* therefore doubted whether a refusal to deliver up goods so left was within the scope of *F.*'s authority, or would make defendants liable: and therefore he did not concur in holding the direction right, not being satisfied that evidence had been given upon which a jury could find for plaintiffs.

Per *Maule J.* The goods having been once in defendants' possession, it lay within the scope of *F.*'s authority to deliver them up, whether, in allowing them to be planted, he exceeded his power or not. And, further, that it was not beyond the *prima facie* power of *F.* to grant any reasonable accommodation to customers; and to allow plaintiff to store his quicks in the Company's ground till wanted was not *prima facie* an unreasonable accommodation.

Judgment affirmed. *Giles v. Taff Vale Railway Company, 822.*

III. Authority of servants.

1. Of servants of incorporated company, without authority under seal, 822. *Ante, II.*
2. To give up or refuse to give up goods carried, 822. *Ante, II.*
3. To grant reasonable accommodation in storing goods carried, 822. *Ante, II.*

IV. Acts within general scope of business.

1. Warehousing ancillary to carriage, 822. *Ante, II.*

2. Reasonable accommodation according to the nature of the goods, 822. *Ante*, II.

V. Delivery to.

1. Delivery of goods to, 364. *Vendors*, II. 1.
2. Delivery of bill of lading to, 364. *Vendors*, II. 1.

VI. Notice by.

Distinction between public notices and special notices, 750. *Ante*, I.

VII. Transactions in particular instances.

Carriage and storing of plants, 822. *Ante*, II.

VIII. Evidence.

Of carriage and reasonable warehousing, or merely of carriage, or falling short of the relation of carrier and customer, 822. *Ante*, II.

CASE.

Action on the case. *Tort*.

CAUSE.

Of action. See *Action*, I.

CERTIFICATE.

I. Of character.

Does not pass to assignees, 790. *Debtor*, VI. 1.

II. False certificate as to paid up capital, 856. *Charter*, I.

III. Of approval of engines to be used on another party's railway, 793. *Distress*, II.

IV. Of custom by recorder, 625. *London*.

CERTIORARI.

I. Costs on removal of indictment.

1. Defendant discharged by proof under his bankruptcy, 176. *Bankrupt*, III.

2. Bail not discharged by proof under principal's bankruptcy, 176. *Bankrupt*, III.

II. In particular instances.

To mayor &c. to certify a custom by their recorder, 606, 627. *London*.

CHAMBERS.

Judge at. See *Judge*.

CHARTER.

I. Grant.

Whether the Crown can attach a condition precedent to forfeiture for breach of condition.

A charter incorporating a trading company, directed, amongst other things, that the Corporation should not begin business until it had been certified to the President of the Board of Trade, by at least three of the Directors, that at least one half of the capital had been subscribed for, and at least 50,000*l.* paid up. The charter contained a proviso that, in case the Corporation should not comply with any "the directions and conditions in Our said letters patent contained, it should be lawful for the Queen" "by any writing under the great seal or under the sign manual," "to revoke and make void" the charter, "either absolutely, or under such terms and conditions as" the Queen should think fit. In *sci. fa.*, at the relation of a private prosecutor, it was suggested, amongst other things, that, before the Corporation began business, a certificate was given by the Directors to the President of the Board of Trade that 50,000*l.* had been paid up, which certificate was false in fact to the Directors' knowledge; and, on a traverse of this, the verdict passed for the Crown. Judgment quod cancellateur having been entered in the Q. B., and error brought in the Exch. Ch.:

Held, by *Jervis C. J.*, *Pollock C. B.*, *Cresswell*, *Williams* and *Talfourd Js.*, and *Platt* and *Martin Bs.*, that the judgment was correct. *Parke B.* dissentiente.

All the Judges agreed that for an abuse of the franchise by matter dehors the conditions the sci. fa. would lie: and that, unless the proviso had the effect of controlling the conditions, the sci. fa. would also lie for the breach of express conditions; and that the fiat of the Attorney General for a sci. fa. to repeal a charter for abuse, or for breach of a condition express, or implied, was as of right to every subject grieved, though not as of course to any subject asking for it. But

Parke B. held 1st: that the giving of a false certificate was a breach of the express conditions in the charter only, and not an independent abuse by matter dehors these conditions; *Jervis C. J.*, *Cresswell J.* and *Martin B.* holding the contrary; the other Judges not expressing their opinions on this point.

Parke B. held 2dly: that the true construction of this charter, including the proviso, was to shew an intention on the part of the Crown to make a writing under the great seal or sign manual a condition precedent to the forfeiture of the charter for breach of any express condition; *Martin B.* inclining to agree in this; *Jervis C. J.*, *Pollock C. B.*, *Cresswell J.*, *Platt B.*, *Williams J.* and *Talfourd J.* holding that such an intention did not appear.

Parke B. held 3dly: and semble per *Martin B.*: that it was competent for the Crown, by apt words in a charter, to attach such a condition precedent to the forfeiture of a franchise for breach of express condition. *Jervis C. J.*, *Pollock C. B.* and *Cresswell J.* dubitantibus, at least where the condition affects the interests of other subjects. *Eastern Archipelago Company v. The Queen*, 856.

II. Construction of.

1. Grant of dues in general terms followed by special regulations as to particular classes.

A charter of 3 *Ja.* 2., granted to

the Corporation of the Master, Pilots and Seamen of *Newcastle upon Tyne* primage (described in the charter as an ancient duty) upon goods brought by ship into the *Tyne*, or any of the creeks of *Newcastle*, of which *Sunderland* was one, to be rated and accounted "in manner and form following: that is to say," aliens and strangers born, and all other persons arriving with ships in *Newcastle* within any of the creeks and not belonging to the same, to pay before they departed with their ships; and every free merchant and inhabitant of *Newcastle*, arriving in the *Tyne* with a ship, within ten days after landing the goods. The charter also granted to the Corporation all other perquisites, ancient duties and profits which they had theretofore lawfully had and enjoyed; and also provided that the sums granted by the charter should be in lieu of all other duties theretofore received.

Held: 1. That the charter was not inconsistent with the claim of primage in respect of goods imported into *Sunderland* by merchants resident there.

2. That evidence of usage was admissible in support of the claim. *Bradley v. Pilots of Newcastle*, 427.

2. How far explained by usage, 427. *Ante*, l. 428 n. *Post*, V. 1.

3. What is an ancient charter, 427. *Ante*, l. 428 n. *Post*, V. 1.

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10. "Expences incurred," 182. *Parliament*.
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20. "By the act of the present session of Parliament," 694, 714. *Land Tax*.
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22. "Without assigning any sufficient reason," 952. *Master and Servant*, VI. 1.
23. "Rescind," 678, 685. *Contract*, IV. 1.
24. "Reserved, due, or made payable," 564. *Distress*, III.
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26. "That is to say," 427, 428 n. *Charter*, II. 1. V. 1.

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1. An arrangement by local acts, when it does not amount to a contract, 654. *Gaol*, I. 1.

2. Requisite assent to terms, 750. *Carrier*, I.

II. Construction.

1. According to the circumstances of the case and the meaning that would be attached by the parties.

Action on an agreement, by which defendant, a wine merchant at C., sold to plaintiffs his house and premises at C. and his stock in trade, and also sold the good will of his business, and in consideration thereof promised them not directly or indirectly to "set up, embark in, or carry on, the business or trade of a wine merchant at C., or at any other town or place within the three counties of C., A. or M." Breach: That he had done so. Issue thereon. On the trial, it was admitted that, after the agreement, defendant commenced business, as a wine merchant, at a town not within the prohibited district, and from thence in many instances sup-

plied wine to persons resident within the district, in pursuance of orders solicited by him within the district : but he had no residence, warehouse or place of business within the district : and it was left to the Court, as a mixed question of law and fact, to say whether this was a breach. Held : that defendant might carry on business within the district, to such an extent as to be a breach of the contract, though he had neither place of business nor stores within the district. And held also, as a matter of fact, that he had supplied wine so systematically within the district, as to have made a business of it. And the verdict was entered for plaintiff. *Turner v. Evans*, 512.

2. Not limited to the meaning that would be attached by strangers ignorant of the circumstances, 512. *Ante*, 1.

3. So as to give effect to every part, 836. *Vendors*, I.

III. Alteration.

By inserting rate of interest in the corner, 763. *Bills*, II. 1.

IV. Executory.

Breach by renunciation before time for executing it.

Declaration on an agreement to employ plaintiff as a courier, from a day subsequent to the date of the writ : averment that plaintiff, from the time of the agreement, till the refusal by defendant after mentioned, was ready and willing to perform his part of the contract : Breach, that, before the day for the commencement of the employment, defendant refused to perform the agreement, and discharged plaintiff from performing it, and wrongfully wholly put an end to the agreement. On motion in arrest of judgment :

Held : that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract ; and that an action will lie for such breach before the time for the

fulfilment of the agreement. That it sufficiently appeared, on the face of this declaration, that there was on the part of defendant, not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to plaintiff, on which plaintiff was entitled to act ; and consequently that plaintiff was entitled to judgment. *Hochster v. De la Tour*, 678.

2. Discharge by breach, 678. *Ante*, 1.

V. Parties.

1. Co-contractors. *Co-contractor*.

2. Master of ship, 301. *Shipping*, III. 1.

3. Municipal corporation : effect of enlargement of boundaries, 654. *Gaol*, I. 1.

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2. Holder of a share in a Société Anonyme, 476. *Action*, I. 1.

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1. What is, 476. *Action*, I. 1.

2. Essential to right to sue on contract, 476. *Action*, I. 1.

3. Not essential to right to sue for damages from misrepresentation, 476. *Action*, I. 1.

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IX. Mutuality.

Implied agreement to provide employment, 357. *Master and Servant*, I. 1.

X. Illegality.

1. Distinction where the contract is not entered into until after the illegal purpose has been effected, 118. *Covenant*, I.

2. Liability of employer for acts of contractor, 767. *Contractor*.

XI. Implication.

1. Of mutuality, 357. *Master and Servant*, I. 1.
2. From conduct, 750. *Carrier*, I.

XII. Renunciation.

Before time for executing the contract, 678. *Ante*, IV. 1.

XIII. Rescinding.

What it is, 678, 685. *Ante*, IV. 1.

XIV. Binding of the contract.

Delivery and acceptance, 364. *Vendors*, II. 1.

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1. Malicious procurement by a stranger to the contract, 216. *Action*, I. 2.
2. By carrying on business at a particular place, 512. *Ante*, II. 1.
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1. Not to carry on trade in a certain district, 512. *Ante*, II. 1.
2. Special contract for maintenance of city prisoners in county gaol, 654. *Gaol*, I. 1.
3. To employ plaintiff as courier, 678. *Ante*, IV. 1.
4. To purchase cargo at the quantity stated in the bill of lading, 836. *Vendors*, I.

CONTRACTOR.

Liability of employer for acts of contractor.

Where the thing contracted for is tortious.

Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. *Ellis v. Sheffield Gas Consumers Company*, 767.

CONTRIBUTION.

I. Liability: at law.

1. For what amount.

Plaintiff, being a provisional committee-man, became with eleven others, including defendant, liable for a debt contracted in respect of the scheme. The creditor sued plaintiff, who ultimately paid the whole debt. Two of the original cocontractors died before the payment. Plaintiff sued defendant for contribution. Held:

1. That, though there might be many cross liabilities amongst the provisional committee-men, in respect of the scheme, an action lay, at law, for contribution against such of them as were liable to pay this debt, provisional committee-men not being partners.

2. That the plaintiff was entitled to recover only one twelfth of the debt; the liability of a cocontractor to one who has paid the entire debt being, at law, to contribute an aliquot part according to the number of persons originally liable, without reference to the number liable at law at the time of payment.

Semble: that an action would have lain at law, for contribution, against the representatives of the deceased contractor. *Batard v. Hawes*, 287.

2. Notwithstanding cross liabilities, 287. *Ante*, I.

3. Liability of representatives, 287. *Ante*, 1.

4. The liability arises out of the original joint contract, 287. *Ante*, 1.

II. In particular instances.

Amongst provisional committee-men, 287. *Ante*, I. 1.

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Effect as to construction of statutes, 694, 716. *Land Tax*.

CONVERSION.

See Page 822. *Carrier*, II.

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II. Commitment in default of payment.

1. Warrant issued immediately on conviction in defendant's absence, 580. *Assault*, I. 1.

2. To what house of correction, 580. *Assault*, I. 1.

III. Protection of officers.

Where Court of competent jurisdiction has decided erroneously, 748. *Abatement*.

COPYHOLD.

I. Admittance.

1. Before payment of fine.

Tenant in fee of copyhold hereditaments devised them to *E.*, *M.* and *W.* on certain trusts. *E.* demanded admittance: the steward refused admittance, except upon payment of a

treble fine. This Court made absolute a rule for a mandamus commanding to admit, the lord being bound to admit before payment of fine, and the right to the fine accruing only by reason of the admittance. *Regina v. Lord Wellesley*, 924.

2. Mandamus to admit, 924. *Ante*, 1.

II. Fines.

When they become due, 924. *Ante*, I. 1.

III. Mines.

Possession of the surface raises presumption of possession of the minerals, 132. *Mine*, I. 1.

COPYRIGHT.

Entries at Stationers' Hall.

Restriction on the use of them whilst the question of copyright is undetermined: varying and expunging.

C. brought an action against *D.* for publishing three pieces of music alleged to be the copyright of *C.* Before the action, three entries had been made in the registry at *Stationers' Hall*, kept under stat. 5 & 6 *Vict. c. 45. s. 11*. These entries, as they stood, would afford *prima facie* evidence of *C.*'s copyright in the three pieces. *D.* obtained a rule *Nisi* to expunge or vary those entries. It was obtained on an affidavit by which it appeared that *D.* claimed no copyright in the airs himself, but that his case was that they were old pieces and that the persons who on the entries professed to be the authors were not really the authors; and the affidavit deposed to information and belief as to facts, which, if true, proved that the pieces were older than the supposed authors. The counsel for *C.* refused to consent not to use these entries on the trial.

The Court declined to expunge the entries, but made an order, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which *C.* should be plaintiff, and on

the trial of which the entries should not be used: and that in the mean time proceedings in the action should be stayed. *Ex parte Davidson*, 577.

CORONER.

Action against, for false imprisonment.

Measure of damages: expenses of setting aside the inquisition.

Defendant, by a warrant of commitment on a coroner's inquisition held without jurisdiction, caused plaintiff to be imprisoned. Plaintiff was bailed, and afterwards, while on bail, procured the inquisition to be quashed.

Held that, in an action for such false imprisonment, plaintiff was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition. *Fozall v. Barnett*, 928.

CORPORATION.

I. Municipal. *Municipal Corporation*.

II. Conversion by.

Authority of officer, 822. *Carrier*, II.

III. Dissolution for misuse and abuse, 856. *Charter*, I.

COSTS.

I. On rules; generally.

1. Notice of intention to apply for costs.

The Court will not grant costs on making a rule for a mandamus absolute, upon a mere affidavit of service: but on affidavits shewing ground for believing that the litigation is at an end, and that the defendants have had notice that the application will be made for costs, at the time the rule is made absolute, the Court will make it absolute with costs. *Regina v. East Anglian Railway Company*, 475.

2. What the affidavits must shew, 475. *Ante*, 1.

COSTS.

II. In cases of concurrent jurisdiction with the County Court: allowance by the superior Courts and Judges.

1. Whether the power to allow the plaintiff's costs is discretionary.

In a case where the Court of Queen's Bench had concurrent jurisdiction with the county court by stat. 9 & 10 Vict. c. 95. s. 128., the plaintiff recovered only 40s. damages. This sum he accepted from the defendant without prejudice to any claim for costs: and he summoned the defendant to shew cause before a Judge at chambers why the costs should not be taxed, and paid by defendant to plaintiff. The Judge, considering that a discretion on this point was vested in him by stat. 13 & 14 Vict. c. 61. s. 13., refused to make an order. In the next term but one after this decision, the plaintiff moved the Court of Queen's Bench that the costs might be taxed, and paid to him by the defendant; relying on a decision of the Court of Common Pleas, since the hearing at chambers, that the Judge, under sect. 13, was bound to grant costs.

Held that the application was too late.

Quere, whether the enactment in stat. 13 & 14 Vict. c. 61. s. 13., that the Judge in the cases there mentioned, "may" order costs, be imperative or only permissive. *Orchard v. Mossy*, 206.

2. Power imperative.

Where a plaintiff, in an action in the Superior Courts, recovers damages not exceeding those named in stat. 13 & 14 Vict. c. 61. s. 11., but shews, to the satisfaction of the Court or of a Judge at Chambers, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts and county courts under stat. 9 & 10 Vict. c. 95. s. 128., or for which no plaint could have been entered in a county court, or which has been removed from a county court by certiorari, he is entitled, under stat. 13 & 14 Vict. c. 61. s. 13., to his costs *ex debito justitiæ*; and the Court or

Judge has no discretion as to granting or refusing them. *Crake v. Powell*, 210.

3. Application when not too late: arbitration.

After issue joined in an action of assumpsit commenced in this Court, the case was referred, and, on 9th June 1852, an award was given for the plaintiff for less than 20*l*. The parties dwelt more than twenty miles apart. In Hilary Vacation, 1853, a summons was taken out to shew cause why plaintiff should not have his costs, under stat. 13 & 14 Vict. c. 61. s. 13.

Held, not too late. *Morris v. Bosworth*, 213.

4. Application when too late: long acquiescence in wrong decision, 206. *Ante*, 1.

III. In particular instances.

1. Interim decree for costs in *Scotch* court, 14. *Foreign Judgment*.
2. Of suspended order, 84. *Poor*, XIII.
3. On removal of indictment by certiorari: liability of bail, 176. *Bankrupt*, III.
4. On making rule for mandamus absolute, 475. *Ante*, I. 1.
5. On reference back to same arbitrator, 946. *Arbitration*, IV. 1.

IV. Remedy for.

1. Distress, 84. *Poor*, XIII.
2. Execution for, after payment of debt, 279. *County Court*, VII. 1.

COUNTY.

Arrangements with boroughs.

What statutory arrangement does not constitute a special contract, 654. *Gaol*, I. 1.

COUNTY COURT.

- I. Cause of action arising in district.

Letters of administration granted out of the district.

A. by will bequeathed to his servant F., "should my executors think proper," 20*l*., "conditional on his continuing to conduct himself faithfully in all respects," and appointed executors. The will was made in the district of the county court of K. and the testator died there. The executors renounced probate; and M. took out letters of administration with the will annexed, in the Prerogative Court of the Archbishop of Canterbury. M. resided in London. F., by leave of the judge of the county court of K., sued M. in that court for the 20*l*. On a rule to set aside a judge's order for a prohibition:

Held: that the grant of letters of administration was part of the cause of action, and that the judge of the county court of K. had not, under stat. 9 & 10 Vict. c. 95. s. 60., jurisdiction in respect of it over M. who was not within his district: and on that ground the rule to set aside the judge's order was discharged.

Whether the bequest, in these terms, was a legacy which might be recovered in the proper county court, under sect. 65, or a bequest in trust, only to be enforced in equity, *quare*? Per Lord Campbell C. J.: *Semble*, that it was a legacy which might be recovered in the proper county court. *Re Fuller*, 573.

- II. Jurisdiction: notwithstanding that title is in question.

Under Nuisances Removal Act.

The amount paid for carrying into force an order of two justices to abate a nuisance, under stat. 11 & 12 Vict. c. 123., may, under the provisions of sect. 3, be recovered in the county court from the owner of the premises where the nuisance existed, though title to land comes in question. *Semble*: that title comes in question if the party sued, as owner of land, denies that he is owner. *Regina v. Harden*, 188.

- III. When it is that title is in question.

1. When person charged as owner denies the ownership, 188. *Ante*, II.

2. Title to office of parish clerk, 744. *Clerk*.

IV. Jurisdiction : recovery of possession of land.

Where rent is under 50*l*. but the annual value above 50*l*.

A. brought a plaint in the county court against *B.* to recover possession of land demised by *A.* to *B.* for a term which had expired. There had been no fine ; and the rent had been under 50*l*. : but the annual value of the premises was above 50*l*. On a rule for a prohibition :

Held, by Lord *Campbell* C. J. and *Erle* J., that stat. 9 & 10 *Vict.* c. 95. s. 122. gives the county court jurisdiction if either the rent or the value fall short of 50*l*.

Held, by *Crompton* J., that it gives the county court jurisdiction only where neither the rent nor the value exceeds 50*l*.

A rule for a prohibition was discharged. *Re Harrington, Earl of*, 669.

V. Jurisdiction as to legacies.

What bequest may be recovered in the county court, 573. *Ante*, I.

VI. Jurisdiction in Insolvency.

1. Rehearing : Insolvent Debtor's Court.

Under stats. 1 & 2 *Vict.* c. 110. s. 96. and 10 & 11 *Vict.* c. 102. s. 10., the Court for the relief of Insolvent Debtors has no jurisdiction to rehear a case heard before a judge of the county court on a petition transmitted to such judge from the Court first mentioned. *Phillips, Ex parte*, 192.

2. Whether the judge of the county court has jurisdiction to rehear. *Ex parte Phillips*, 192, 195. *Ante*, I.

3. The judge of the county court has jurisdiction to rehear.

An insolvent debtor, resident in the

district of the county court of *Y.*, more than 20 miles from the General Post Office, petitioned the Court for the relief of Insolvent Debtors. His petition and schedule were transmitted to the judge of the county court of *Y.*, by whom, after hearing, he was discharged ; and the schedule and petition were returned to the Court for the relief of Insolvent Debtors. Afterwards, some of his creditors applied to the judge of the county court for an order for a rehearing on the ground of fraud. The judge granted a rule ; but the insolvent did not appear. Application was made to the judge for a warrant to apprehend him. The insolvent was out of the district of the *Y.* county court. The judge refused to act. This Court, under these circumstances, made a rule absolute for a mandamus to issue a warrant, as in the opinion of the majority, *Crompton* J. dissentiente, the judge of the county court had jurisdiction to do that. But the Court refused to express any opinion as to whether the warrant could be executed out of the district. *Regina v. Dowling*, 196.

4. Mandamus to issue warrant, 194. *Ante*, 3.

5. Execution of warrant out of district, 194. *Ante*, 3.

VII. Payment.

1. To the party, as distinguished from payment to the officer or into Court.

If a plaintiff in the county court, having obtained judgment for debt and costs, receives payment of the debt only, he may, under stat. 9 & 10 *Vict.* c. 95. s. 94., require the clerk of the county court to issue execution against the debtor's goods for the costs only : although the judge's order in the cause directed that payment should be made to the clerk at the court-house, and the debt was not paid there or to the clerk at any place.

A mandamus to issue execution in such case is properly directed to the clerk, not to the judge. *Regina v. Fletcher*, 279.

2. What does not purge contempt in not appearing to judgment summons, 271. *Post*, IX. 1.

VIII. Execution.

1. For costs only, 271. *Post*, IX. 1.
2. *Mandamus* to issue, 271. *Post*, IX. 1.

IX. Warrant of commitment.

1. Contempt in not appearing to judgment summons: payment to the party.

S. sued *D.* in the county court, and recovered. *D.* did not pay the amount adjudged against him. A judgment summons issued against *D.* who did not appear as required by it, and the judge ordered him to be committed for seven days. A warrant issued to arrest him. Then *B.* paid *S.*, the plaintiff in the plaint, the amount of debt and costs, and *S.* wrote to *F.*, the clerk of the county court, to say he was paid. Afterwards *D.* was arrested under the warrant, and detained for a few minutes till *F.*, the clerk of the county court, who had forgotten the receipt of the notice from *S.*, found that notice and ordered his discharge. *D.* brought an action for the imprisonment against *F.* and the bailiff.

Held, that payment to the party, after the warrant issued, did not operate as a supersedeas, and that the arrest and detention were both justified.

Semble, that the discharge of the prisoner, after the letter from the party was found, was irregular. *Davies v. Fletcher*, 271.

2. Successive commitments for successive defaults on the same judgment.

To a *habeas corpus ad subjiciendum*, commanding the keeper of The Debtors' Prison in *London* to have the body of *B.* before the Court, the keeper made a return that *B.* was detained in his custody by virtue of a warrant of the county court of *Mid-dlesex*, for commitment of *B.* for forty days, after examination of *B.*, as a

defendant against whom judgment had passed in the county court. The warrant was in the form given in the schedule to the rules of practice made under stat. 12 & 13 *Vict. c. 101. s. 12*. The return stated, in addition, that *B.* was brought into his custody on a previous day under a similar warrant of commitment, on the same judgment, for seven days: that *B.* remained in the keeper's custody for that term: that *B.* was afterwards brought into the keeper's custody, on another warrant, on the same judgment, for commitment, for forty days, and that *B.* remained in the keeper's custody for the term last mentioned. Both those terms had expired before the date of the summons recited in the warrant under which the prisoner was now detained.

Prisoner remanded, inasmuch as defendant was liable to be committed, upon the same judgment, for every fresh default, and the Court would intend each commitment to be for a fresh default, and it was not necessary that any one commitment should refer to any previous one. *Re Boyce*, 521.

3. Nature of the warrant, 271. *Ante*, 1.
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6. Intendment in construing commitment, 521. *Ante*, 2.

X. Discharge from imprisonment under warrant.

1. What payment insufficient after the issuing of the warrant, 271. *Ante*, IX. 1.
2. What discharge irregular, 271. *Ante*, IX. 1.

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COVENANT.

I. Illegality.

Connection of the deed with the illegal purpose how shewn in pleading.

To an action upon a covenant by defendant to pay money, defendant pleaded that, before the making of the deed, it was unlawfully agreed, between plaintiff and defendant, that plaintiff should sell to defendant, and defendant purchase of plaintiff, and accept from him a conveyance of land for a term, in consideration of a sum of money to be paid by defendant to plaintiff, "to the intent, and in order, and for the purpose, as the plaintiff at the time of the making the said agreement well knew," that the land should be sold by lottery, contrary to the statute. That afterwards, "in pursuance of the said illegal agreement," the lands were assigned for the term; and defendant made the deed to secure payment of a part of the purchase money to be paid by defendant to plaintiff, which remained unpaid.

Held a bad plea, on motion for judgment non obstante veredicto; for that it did not connect the deed of covenant with the effectuating the illegal purpose. *Fisher v. Bridges*, 118.

II. Distinction where the illegal purpose was effected before the covenant was entered into, 118. *Ante*, I.

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I. Given to agent of two distinct parties, 301. *Shipping*, III. 1.

II. To whom given on sale of bill, 89. *Bills*, V. 1.

III. Right to pledge, 89. *Bills*, V. 1. 301 *Shipping*, III. 1.

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1. Proviso in a statutory power as to doing as little damage as possible, 466. *Mandamus*, II.

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2. To individual by false public representation, 476. *Action*, I. 1.

3. By malicious procurement of breach of contract, 216. *Action*, I. 2.

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I. Generally.

Locality of, in Foreign Attachment, 605. *London*.

II. Payment.

Under Foreign Attachment, 605. *London*.

III. Assignment of.

Effect as regards Foreign Attachment, 605, 625. *London*.

DEBTOR.

I. Insolvent Debtors' Court.

Jurisdiction and power to construe acts judicially.

A judgment, entered up in one of the Superior Courts at *Westminster* in the name of the assignee of an insolvent on the warrant of attorney signed by the insolvent before adjudication, pursuant to stat. 1 & 2 *Vict. c. 110. s. 87.*, is not a record over which such Superior Court exercises control except in respect of irregularity in the proceedings in such Court itself: but the Insolvent Debtors' Court, alone, is to decide when satisfaction is to be entered, and for that purpose is to construe the Act judicially. Therefore, in a case where the Commissioners of that Court differed in opinion as to whether on the true construction of the Act, satisfaction ought to be entered on a judgment so entered in the Queen's Bench, the debts having been paid, but without interest, this Court, without expressing any opinion on the construction of the Act, refused a rule for a mandamus commanding a Commissioner to enter satisfaction; and discharged with costs a rule calling on the assignee, the plaintiff on the record, to shew cause why satisfaction should not be entered up. *Sturgis v. Joy*, 739.

II. Insolvent: discharge by detaining creditor, &c., without adjudication.

1. Action by Insolvent to recover his property.

Where an insolvent, after a vesting order has been made on his own petition, is discharged, without adjudication, by the default or consent of creditors, and sues a party detaining goods which came to the provisional assignee before the discharge, no order of the Insolvent Debtors' Court having been made for delivering them up:

Held, by Lord Campbell C. J. and Coleridge J., that, whether or not the property revested in the insolvent by such discharge, the action cannot, by sect. 44. of stat. 1 & 2 *Vict. c. 110.*, be brought against a person acting by authority of the provisional assignee, though the authority was not given till after the discharge.

Held, by Erle J., that the property does not so revest in the insolvent, and therefore that the action cannot be brought by him against any party.

On error in the Exchequer Chamber:

Held: that the property does not so revest, and therefore that the action cannot be brought by the insolvent against any party. *Kernot v. Pittis*, 406.

2. Revesting of property in the insolvent's possession, 395. *Bills*, VI.

III. Insolvent: discharge pursuant to adjudication.

1. Whether on notice to the gaoler, without warrant, 1. *Post*, IV.2. Effect of false representations as to having a warrant, 1. *Post*, IV.

IV. Insolvent: confinement under adjudication.

Remedy for confinement in wrong place.

Trespass for imprisoning plaintiff in the remand ward in the Queen's Prison. Plea: justification under ca. sa. at the suit of W., to the sheriff of *Yorkshire*, under which plaintiff was

arrested, and remained in the sheriff's custody, till he was brought up on habeas corpus and committed by order of a judge to defendant as keeper of the Queen's Prison, with the cause of his detention aforesaid. New assignment : That plaintiff, whilst in custody at Y., petitioned the Court for the relief of Insolvent Debtors; that his petition was transmitted to the judge of the county court of Y., who adjudicated that for fraud he should be remanded for one year from 12th April 1851, and then discharged : that the judge of the county court made a warrant, directed to the gaoler of Y., ordering his discharge from the detainer of W. at that date; and that the warrant, as well as the detainer, was delivered to the defendant on plaintiff's committal : and plaintiff new assigned imprisonment after 12th April 1852. Plea: That defendant had not the warrant. Replication: That he had the warrant. Issue thereon.

On the trial it appeared that defendant had only a copy of the warrant; but the jury found that he led plaintiff to believe he had the original. It appeared that plaintiff was placed in the remand ward, and also that he had applied without success to a Judge, and to the Court for the relief of Insolvent Debtors, for a warrant addressed to defendant to authorize his discharge pursuant to the adjudication, and that he was detained three days after 12th April 1852.

Held: That there was nothing to preclude the defendant from shewing that his representation that he had the warrant was erroneous, as there was no evidence either that he intended plaintiff to act upon the faith of representation, or that plaintiff did so act upon it to his prejudice; and that without both these ingredients there can be no conclusion by a representation.

Held, also, that plaintiff was not entitled to judgment non obstante veredicto, on the ground that the placing in remand ward was not justified, the place of custody not being the gist of the action, whether defendant's act in that respect was or was not justifiable.

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Quere, whether the gaoler was bound to discharge plaintiff on notice of the adjudication, without a warrant to himself for his own protection. *Howard v. Hudson*, 1.

V. Insolvent: practice.

Jurisdiction to rehear, 192, 196. *County Court*, VI. 1, 3.

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1. What property does not pass.

Diplomas conferring degrees and honours, and certificates from medical institutions and practitioners, do not pass to the provisional assignee under the vesting order of the Insolvent Debtors' Court under stat. 1 & 2 Vict. c. 110. s. 37. *Kernot v. Catlin*, 790.

2. When it is annulled, 406. *Ante*, II. 1.

VII. Judgment on the warrant of attorney.

1. What court is to direct satisfaction to be entered, 739. *Ante*, I.2. Whether a security for interest, 739. *Ante*, I.

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I. Of issue, 27, *Devise*, I. 970. *Estate*, I.

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By refusal to deliver for tortious purpose, 793. *Distress*, II.

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After illegal arrest by the same or a different party, 717. *Arrest*, I. 1.

DETAINING CREDITOR.

See Page 395. *Bills*, VI.

DEVISE.

I. Construction : estate in fee simple.

Remainder limited to heirs general when not cut down by subsequent proviso for failure of issue.

A., by his will made in 1788, devised *Blackacre* to trustees to the use of his grandson M. for life, remainder to the use of M.'s children as he might appoint, and, in default of appointment, "to the use of all the children, both sons and daughters, of the body of the said M. lawfully issuing, equally to be divided amongst them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever; and, for default of such issue, to the use of all the children of my brothers and sister, equally to be divided amongst them, share and share alike, and to take as tenants in common and not as joint-tenants, and their heirs for ever." He then devised *Greenacre* to the use of his grandson W. for life, with limitations over expressed in the same terms. Then followed a proviso, "in case either of my said grandsons shall happen to die without issue of their bodies lawfully begotten, that my said trustees shall stand seised of the several hereditaments and estates hereinbefore devised for the benefit of such grandson so dying to, for and upon the like uses and trusts as they shall stand seised of the hereditaments and estates before devised for the benefit of such survivor." At the time the

will was made, the testator had two infant grandchildren *M.* and *W.*, and several nephews. *M.* and *W.* both survived him. *M.* had one child *E.*, a daughter, who died in his lifetime, an infant, before stat. 3 & 4 *W.* 4. c. 106., leaving defendant, *E.*'s cousin and heir at law. *W.* died without ever having had issue. Then *M.* died. The defendant, who was not a child of a brother or sister of the testator, or heir of such child, claimed *Blackacre*, as heir at law of *E.* The nephews also claimed it.

Held, that *E.* on her birth took a vested remainder in fee in *Blackacre*, which on her death descended to defendant. *Foster v. Hayes*, 27.

II. Construction generally.

1. Remainder to devisee and his heirs, 27. *Ante*, I.
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 1. From arrest under warrant from county court, 271. *County Court*, IX. 1.
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 3. See also *Habeas Corpus*.
- II. Of insolvent debtor, 1, 406. *Debtor*, II. 1. IV. 395. *Bills*, VI.
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- I. What refusal is not an exercise of discretion, 546. *Bastard*, I.
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1. Distinction between an act done in the course of the distress, and an act done after the distress is over, 915. *Action*, VIII. 1.
2. Common law right not taken away by cumulative remedy given by statute, 793. *Post*, II.

II. Damage fasant.

Seizure of uncertificated engine encumbering a railway.

Sects. 115, 116 of the Railways Clauses Consolidation Act provide that no one shall use an engine on the railway of a company which has not been approved of by the company, and that a certificate of the approval may be obtained by certain steps; and that, if an engine be used on the railway without a certificate, the party using shall forfeit to the company a sum not exceeding 20*l.*, and the company may remove the engine.

Held: 1. That the company has a common law right of distress damage fasant on an engine incumbering the railway, if there be no certificate of approval.

2. That to a count, complaining that the company converted the plaintiff's engine to their use, and wrongfully deprived the plaintiff thereof, it is a good plea that the plaintiff demanded it for the purpose and in order that he might use it on the railway without a certificate of approval. *Ambergate &c. Railway Company v. Midland Railway Company*, 793.

III. For rent.

Seizure of goods fraudulently removed to avoid distress for rent.

A tenant on the morning of the quarter-day fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day. The landlord, after the rent had become in arrear, and within thirty days of the removal, followed and seized the goods as a distress.

Held, by Lord *Campbell C. J.*, and *Coleridge* and *Erle J.*s., that his seizure was justified under stat. 11 *G. 2. c. 19. s. 1.*, the rent being due and payable, though not in arrear, at the time of the removal. *Crompton J.* dissented, and holding that (whatever might be the proper construction of the statute in a Court of Error) the previous decisions bound a court of coordinate jurisdiction to hold that it was essential that the rent should be in arrear at the time of the removal. *Dibble v. Bowater*, 564.

IV. For tithe commutation rentcharge.

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1. Who entitled to: landlord and tenant.

A tenant encroached on waste land, not belonging to his landlord, separated from his holding only by a road. He built on the encroachment, and continued to occupy it, as a part of his holding and ancillary to the occupation thereof, for more than twenty years. He then gave up the original holding to his landlord, but claimed to retain the encroachment as his own. In ejectment by the landlord:

Held: that an encroachment made under such circumstances is, as between landlord and tenant, to be presumed to be part of the holding: that it rested on the defendant to shew by other facts that the encroachment was not made as part of the holding; and that the mere intervention of the road did not rebut the *prima facie* presumption. *Andrews v. Hailes*, 349.

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II. On highway.

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II. Equitable defences how far available at law, 46. *Bills*, I. 1.

ERROR.

In criminal cases.

I. Recognizances.

1. Conditions of recognizance upon discharge on bail.

D., being convicted of a misdemeanor at the Sessions, was sentenced to imprisonment: he brought error in the Court of Q. B., which affirmed the judgment; and he was recommitted to prison. He then brought error in the Exchequer Chamber, and entered into a recognizance conditioned to prosecute the writ of error, and abide the judgment of the Court, "and, in case of the affirmance of the judgment against which error is assigned," to "surrender himself personally to be dealt with as our Court of Exchequer Chamber may order." He was then discharged by a Judge at Chambers. Afterwards the recognizance was filed in this Court.

Held: that the discharge was improper, the condition of the recognizance not being in conformity with stat. 8 & 9 *Vict.* c. 68. s. 1.; and this

Court made absolute a rule for apprehending and recommitting *D.*

The form of the recognizance did not appear from the affidavits. Held, nevertheless, that this Court would notice it, on the argument of the rule, as it was on the files of the Court. Although it was headed "In the Exchequer Chamber." *Dugdale v. The Queen*, 129.

2. What documents the Court will notice, 129. *Ante*, 1.

II. Apprehension and recommitment for defect in recognizances, 129. *Ante*, I. 1.

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I. Construction of limitations.

Remainder expectant on general failure of preceding limitations.

By marriage settlement, *C.*, the husband, in consideration of the intended marriage and of the fortune of *S.*, the wife, to which *C.* was to become entitled on the marriage, released land to the use of himself in fee until the marriage; and after the marriage, to the use of himself for life; remainder to trustees to preserve contingent remainders; and, after the decease of *C.*, in case *S.* should survive him, to the use of *S.* for life; remainder to trustees to preserve contingent remainders; and, after the decease of the survivor of *C.* and *S.*, in case there should be only one child of the marriage then living, and no other child then dead leaving issue, to the use of such child in fee; but, in case there should happen to be more than one such child living at the decease of the survivor of *C.* and *S.*, or any child or children then dead leaving issue, then to the use of all such children of *C.* and *S.* and such children's children, respectively, for such estates as *C.* and *S.* should jointly appoint; and, in default of such appointment, as the survivor should appoint; and, in default of such appointment, to the use of all the children of the marriage as tenants in common and of the heirs of their respective bodies, with cross remain-

ders; and, "for default of all such issue," to the use of four brothers and sisters of *S.* as tenants in common in fee.

S. survived *C.*: there were two children of the marriage, of whom both died, without leaving issue, in the lifetime of *S.* No appointment was made.

Held: by Lord *Campbell* C. J., *Coleridge* and *Wightman* Js., that the remainder to *S.*'s brothers and sisters took effect, as it was not a limitation in remainder after the determination of the estates given to the children as tenants in common in tail by the limitation immediately preceding, but was an independent limitation to take effect in case there were, at the time of the death of the survivor of *C.* and *S.*, no issue in whom any of the previous limitations could vest.

Crompton J. dissentiente. *Doe dem. Lees v. Ford*, 970.

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1. Of an immediate lease for years granted by remainderman, 331. *Lease*, I.
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1. Not where not intended to be acted on, 1. *Debtor*, IV.
2. Not where not acted on, 1. *Debtor*, IV.

II. By conduct.

When not by mere inaction, 364. *Vendors*, II. 1.

III. By execution of instrument.

As maker of a joint and several promissory note, 46. *Bills*, I. 1.

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Where no irregularity appears on the face of a parish binding, 809. *Poor*, IX. 1.

II. Restrictions on the use of statutory evidence.

Issue directed on the trial of which it is not to be used, 577. *Copyright*.

III. Inspection of documents under stat. 14 & 15 *Vict.* c. 99. s. 6.

1. To enable plaintiff to meet defendant's case.

Plaintiff brought an action to recover from defendant a deed made between *P.* and plaintiff. Defendant pleaded a general lien for work done by him as attorney for plaintiff. Under a judge's order, defendant delivered particulars of his lien, which consisted of a bill of costs in an action of *P.* against *G.* Plaintiff applied, under stat. 14 & 15 *Vict.* c. 99. s. 6., to be at liberty to inspect defendant's day books, bill books, cash books, letter books, ledgers and journals, commencing and concluding at days named, and to take copies of or extracts from such parts as related to the particulars of lien.

In support of the application, plaintiff deposed that he was not indebted to defendant for any part of the costs, but that *P.*, if any one, was so indebted. The defendant's day books, &c. (as before), so commencing and concluding, from which books, or some of them, the bill of costs had been taken, would, as defendant believed, furnish material evidence in support of plaintiff's case; and, in particular, would shew that defendant never did any of the work on account of plaintiff, but on account of *P.*; and the inspection was material and necessary to support plaintiff's case. Defendant deposed that he kept no bill book or

journal within certain days, within which time he deposed that all the costs were incurred.

Held: that inspection might be granted for obtaining any evidence necessary to support plaintiff's original case, or to meet the defendant's case, though not for information shewing how defendant's case would be supported.

Held also: that the application was too extensive.

But, per Lord *Campbell C. J.*, *Cole-ridge* and *Crompton* Js., dissentiente *Erle J.*, the inspection was granted of such entries, in defendant's day books, cash books and ledgers, within the days named by defendant, as related to items of the particulars of lien. *Scott v. Walker*, 555.

2. Application must not be merely in general terms, 555. *Ante*, 1.

IV. Secondary: admissibility.

When not on non-production by witness.

A person, not a party to a cause, served in due time with a subpoena duces tecum to produce a document at the trial of the cause, without any legal excuse disobeyed it, and did not produce the document. Held: that secondary evidence of its contents was not admissible under such circumstances. *Regina v. Llanfaethly*, 940.

V. Declaration of deceased persons.

What not sufficiently the ordinary course of their business: oral declaration contradicting written memorandum.

In order to prove notice to quit to have been served upon *R.*, a tenant from year to year, it was proposed to shew that the notice had been served on *W.*, *R.* being absent, and had reached *R.* It was shewn that *J.*, a person deceased, was ordinarily employed for the landlord, to serve notices to quit: that a notice requiring *R.* to quit had been handed to *J.*, who had brought back the duplicate, and had signed an indorsement stating

service on *R.*, and, further, that *J.* had then orally stated that he had delivered the notice to *W.*

Held: that *J.*'s oral declaration was not admissible, as not appearing to have been made in the ordinary course of his business. *Stapylton v. Clough*, 933.

VI. Admissibility of oral evidence adding terms to written contracts.

Whether one of the makers of a joint and several promissory note may shew that he was merely a surety, 46. *Bills*, I. 1.

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To recover money paid by executor de son tort, 630. *Post*, III.

III. Executor de son tort.

Payments by, in due course of administration.

The creditor of a deceased person may retain, against the representative of the deceased, payments made to him out of the assets of the deceased, in due course of administration, by an executor de son tort, if the executor de son tort was really acting as executor so that the creditor might reasonably suppose him to be rightful representative. But acts sufficient to make the executor de son tort chargeable as such do not necessarily make the payment good against the rightful executor. *Thomson v. Harding*, 630.

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What not included, 182. *Parliament*.

FALSEHOOD.

- I. False representation not intended to be acted on, nor acted on, 1. *Debtor*, IV.
- II. False representation in a public prospectus, 476. *Action*, I. 1.

FALSE IMPRISONMENT.

See *Imprisonment*.

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Of Attorney General, 856. *Charter*, I.

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- I. Of order unappealed against, 84. *Poor*, XIII.
- II. Of wrong decision acquiesced in, 206. *Costs*, II. 1.
- III. What interim decree not a final order or judgment, 14. *Foreign Judgment*.

FINE.

On admittance to copyholds, 924. *Copyhold*, I. 1.

FOREIGNER.

Foreign principal, 89. *Bills*, V. 1.

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I. Jurisdiction.

Residence of parties, locality of debt, 605. *London*.

II. Title to the debt.

Equitable interest in another party, 605. *London*.

III. Garnishee.

1. Effect of his having notice that the debt has been assigned, 605, 623. *London*.
2. How far affected by the defendant having no notice to defend, 605, 621. *London*.
3. As against him his creditor cannot controvert the debt sued for, 605, 625. *London*.
4. How far safe by paying under judgment, 605, 621. *London*.

IV. Practical forms.

1. Suggestion for writ to mayor, &c. to certify: certiorari; verbal certificate by Recorder, 605, 626. *London*.

FOREIGN JUDGMENT.

Action on.

When not maintainable the judgment not being final: interim decree for costs, pending appeal.

S. raised an action against *P.* before the Lords of Session in Scotland, who dismissed the action, and found *P.* entitled to his expences. *S.* appealed to the House of Lords. Pending the appeal, *P.* petitioned the Lords of Session for decree and interim execution, under stat. 48 *G. 3. c. 151. s. 17.*, for the expences. The Lords of Session allowed the decree, pronouncing an interlocutor and interim decree for payment, upon security to repay ("caution to repeat") in the event of a reversal of the original judgment in the House of Lords, with warrant, in failure of payment after a time named, to poind *S.*'s goods.

Security having been given, and the time having expired, *P.*, in this Court, sued for the amount of the expences.

Held: that the action was not maintainable, the decree for payment not being in the nature of a final judgment. *Patrick v. Shedden*, 14.

FORFEITURE.

- I. By abuse of franchise, 856. *Charter*, I.
- II. Of false weights &c., 108. *Bona Fides*.

FRANCHISE.

- I. Abuse of, 856. *Charter*, I.
- II. Of dissolved abbey, 580. *Assault*, I. 1.

FRAUD.

1. Fraudulent removal of goods to avoid distress for rent, 564. *Distress*, III.
- II. Misrepresentations in public prospectus, 476. *Action*, I. 2.

FRAUDS, STATUTE OF.

Acceptance of goods, 364. *Vendors*, II. 1.

GAOL.

1. Maintenance of city prisoners in county gaol.

1. What local acts do not amount to a special contract.

The city of *S.* in the county of *W.* had, by charter of *Ja. 1.*, a gaol, and quarter sessions. By a local Act, 25 *G. 3. c. 93.*, the city was required to pull down and rebuild their gaol, and, till it was rebuilt, the city prisoners were to be committed to the gaol of the county of *W.*, the city paying for their maintenance as the justices of *W.* might direct. By a subsequent local Act, 39 & 40 *G. 3. c. liii.*, reciting the former Act, that it was not expedient to rebuild the city gaol, that permission had been asked and obtained from the county justices to continue to commit to the county gaol, and that *R.* had proposed, by way of compensation, to grant to the justices a piece of land for an addition to the gaol, the clauses of stat. 25 *G. 3. c. 93.*, requiring the city to build a gaol, were repealed; the piece of land was vested in the High Sheriff of *W.* for the time being; and the prisoners were in future to be committed to the county gaol. No express provisions were made as to their maintenance.

By the Municipal Corporation Act the bounds of the city of *S.* were enlarged.

Held: that the local acts did not amount to a special contract between the county and city as to the maintenance &c. of prisoners within the meaning of stat. 5 & 6 *Vict. c. 98. s. 18.* *Semble*, that, if it had amounted to such a contract between the county and the ancient city, it would not have been one relating to the prisoners committed from the enlarged city.

Therefore, on a mandamus commanding the city to pay a rateable proportion of the expenses of the gaol, under stat. 5 & 6 *Vict. c. 98.*, a return relying on these Acts as a special contract was held bad, and a peremptory mandamus awarded. *Regina v. New Sarum, Mayor &c.*, 654.

2. Effect of enlargement of city, 654. *Ante*, 1.
3. Mandamus to pay proportion of expenses, 654. *Ante*, 1.

GAOLER.

II. Commitments by county justices to liberty gaol, 580. *Assault*, I. 1.

GAOLER.

Whether he may discharge a prisoner on notice without warrant, I. *Debtor*, IV.

GARNISHEE.

Under custom as to foreign attachment, 605. *London*.

GOOD FAITH.

See *Bona Fides*.

GOOD WILL.

Sale of, 512. *Contract*, II. 1.

GRANT.

I. By the crown.

Restrictions as to forfeiture, 856. *Charter*, I.

II. By remainderman, 331. *Lease*, I.

III. Of Annuity, 374. *Annuity*, II. 1.

IV. Things lying in grant.

When minerals lie in grant, 132. *Mine*, I. 1.

V. Entry and possession.

Grant to two joint-tenants one of whom is already in possession, 132. *Mine*, I. 1.

GUARANTEE.

Fraudulent misrepresentation by public offer to guarantee, 476. *Action*, I. 1.

HABEAS CORPUS.

Ad subjiciendum.

1. Intendment of fresh default, in commitment by county court, 521. *County Court*, IX. 2.

2. What may be shewn on affidavit in answer to a return of warrants of commitment, 717. *Arrest*, I. 1.

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3. Detainer under successive warrants, 717. *Arrest*, I. 1.

4. Form of rule, to dispense with the bringing up of the party, 717, 734. *Arrest*, I. 1.

HARBOUR.

See *Port Dues*.

HEADING.

Of recognizance, 129. *Error*, I. 1.

HEARING.

By Bishop, what is sufficient, 771. *Benefice*, I. 1.

HEIR.

Heir general or heir of the body, 27. *Devise*, I.

HEREDITAMENT.

What is, 744. *Clerk*.

HIGHWAY.

I. Encroachments.

Duty of surveyor to abate after conviction, 748. *Abatement*.

II. Surveyor.

When protected though acting without warrant on an erroneous conviction, 748. *Abatement*.

III. Turnpike road.

What is not a turnpike road within the provisions as to railway bridges, 466. *Mandamus*, II.

HOUSE OF CORRECTION.

See *Gaol*.

HUSBAND AND WIFE.

See *Baron and Feme*.

IDENTITY.

Of parties to successive arrests, 717.
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ILLEGALITY.

I. Generally.

1. Of intended user, as a ground for refusing to restore goods to owner, 793. *Distress*, II.
2. Illegal arrest; subsequent detainer, 717. *Arrest*, I. 1.
3. Award that trains shall travel at a dangerous speed, 530. *Railway*, III. 1.
4. Liability of employer, 767. *Contractor*.

II. Pleading.

1. Illegality not patent must be shewn by pleading, 530. *Railway*, III. 1.
2. Connection of the deed pleaded to with the illegal purpose, 118. *Covenant*, I.

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- I. Of agreement to provide employment, 357. *Master and Servant*, I. 1.
- II. From express provisions for special circumstances, 395. *Bills*, VI. 406. *Debtor*, II. 1.
- III. As to the duration of an arrangement by arbitrators, 530. *Railway*, III. 1.

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I. Generally.

1. Not completely put an end to by letting out on bail, 928. *Coroner*.
2. Illegal, 717. *Arrest*, I. 1.

II. For contempt.

In not appearing to judgment summons, 271. *County Court*, IX. 1.

III. In what place.

Remedy for detaining remanded insolvent in wrong place, 1. *Debtor*, IV.

IV. Discharge.

On what authority, 1. *Debtor*, IV. 271. *County Court*, IX. 1.

V. Action for false imprisonment.

1. Gist of the action, 1. *Debtor*, IV.
2. Damages: expenses of setting aside the inquisition on which the imprisonment was founded, 928. *Coroner*.

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See *Encroachment*.

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Proceedings to compel residence, 771. *Benefice*, I. 1.

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Set off not pleadable to action on the bond, 23. *Bond*, I. 1.

INDENTURE.

Parish apprenticeship, 809. *Poor*, X.

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Of service of notice, 933. *Evidence*, V.

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Of assent, from acting with notice, 750. *Carrier*, I.

INFRINGEMENT.

See *Patent*.

INNKEEPER.

Closing house during usual hours of divine service.

What is meant by "afternoon service."

INQUISITION.

On appeal against a conviction of an innkeeper for, in the parish of *N.*, contrary to the tenor of his license, keeping open his house on *Sunday* during the usual hours of afternoon Divine service in the parish church of *N.*, the Sessions quashed the conviction, subject to a case: by which it appeared that the service in the parish church was formerly at 11 A.M., and at 3 P.M., but in 1826 the hours were changed, and since that time there was service in the church at 11 A.M., in the workhouse at 2 P.M., and in the church at 6 P.M., and that the conviction was for keeping his house open during the service commencing at 6 P.M.

Held, that the expression in the license, under stat. 9 G. 4. c. 61., "usual hours of" "afternoon Divine service" meant usual hours of Divine service if in the afternoon: and that the service at 6 P.M. was in the evening, not the afternoon; and that the conviction was wrong. *Regina v. Knapp*, 447.

INQUISITION.

Expenses of setting aside, 928. *Coroner*.

INSOLVENT DEBTOR.

See *Debtor*.

INSPECTION.

Of documents, 555. *Evidence*, III. 1.

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Of weights and measures, 108. *Bona Fides*.

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I. That a judge has done his duty, 521. *County Court*, IX. 2.

II. Not that speed awarded is dangerous, 530. *Railway*, III. 1.

INTENTION.

1. Breach by communication of intention not to perform contract, 678. *Contract*, IV. 1.

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2. That a representation shall be acted on, 1. *Debtor*, IV.

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See pages 132. *Mine*, I. 1. 331, *Lense*, I.

INTEREST.

Of money.

1. What security for is not the grant of an annuity requiring enrolment, 874. *Annuity*, I. 1.

2. Statement of rate in corner of note, 763. *Bills*, II. 1.

3. Rights of creditors of insolvent debtor, 739. *Debtor*, I.

INTERIM DECREE.

See page 14. *Foreign Judgment*.

INTERLOCUTORY PROCEEDING.

What is, 14. *Foreign Judgment*.

INTERPRETATION.

See *Construction*.

INVENTION.

See *Patent*.

ISSUE.

Limitations for default of, 27. *Devise*, I. 970, *Estate*, I.

JOINT TENANT.

I. Lessee of mines under a copyhold, 132. *Mine*, I. 1.

II. Possession by one of several, 132. *Mine*, I. 1.

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At chambers: review of his decisions.

Reasonable time, 206. *Costs*, II. 1.

JUDGMENT.

I. Final or interlocutory.

Scotch interim decree, 14. *Foreign Judgment.*

II. Jurisdiction over.

When not over judgments on warrants of attorney given to provisional assignees, 739. *Debtor, I.*

III. Entering satisfaction.

On judgments on warrants of attorney given to provisional assignees, 739. *Debtor, I.*

IV. Justification under.

Protection of officers, 748. *Abatement.*

JUDGMENT SUMMONS.

See page 271. *County Court, IX. 1.*

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See *Notice, I.*

JURISDICTION.

I. Over judgments on warrants of attorney given to provisional assignees, 739. *Debtor, 1.*

II. Construction of an alternative provision giving jurisdiction, 669. *County Court, IV.*

III. In liberties, 580. *Assault, I. 1.*

JURY.

Question for.

In what capacity bankers made a payment, 459. *Bank, I.*

JUSTICE OF THE PEACE.

I. Qualification.

Estate in remainder.

Action for penalties under stat. 18 G. 2. c. 20., for acting as a justice of the peace without being qualified. On

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the trial it appeared that an estate, of more than 300*l.* a year, was held in trust for defendant's wife for life, remainder in trust for defendant for life, remainder in trust for the children of the marriage.

Held that this did not qualify him. *Woodward v. Watts, 452.*

II. Jurisdiction in liberties.

1. Where there has been an exclusive jurisdiction extinguished by statute before the franchise came to the hands of the Crown, 580. *Assault, I. 1.*

2. What does not revive the exclusive jurisdiction in a liberty, 580. *Assault, I. 1.*

3. County justices acting out of the liberty with respect to an assault committed in the liberty, 580. *Assault, I. 1.*

4. County justices acting out of liberty committing to liberty house of correction, 580. *Assault, I. 1.*

III. Discretion.

What refusal is not an exercise of discretion, 546. *Bastard, I.*

IV. Commitments by on summary conviction.

1. Warrant issued immediately on a conviction in penalties in defendant's absence, 580. *Assault, I. 1.*

2. To house of correction for a liberty, 580. *Assault, I. 1.*

3. Setting forth evidence in, 952. *Master and Servant, VI. 1.*

V. His acts in binding parish apprentices.

Presumptions from the certificate, 809. *Poor, IX. 1.*

LABOURERS.

Statute of labourers, 216. *Action, I. 2.*

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LANDLORD AND TENANT.

I. Relation how created.

1. Lease by remainderman, to commence immediately, 331. *Lease*, I.
2. Vesting of term without entry or attornment, 331. *Lease*, I.

II. Relation how determined.

1. By long possession without payment of rent, 641. *Limitation*, I. 1.
2. By temporary resumption by lessor at will, 641. *Limitation*, I. 1.

III. What passes by the demise.

Mines without the liberty of working them, 132. *Mine*, I. 1.

IV. Interease termini.

What is not a mere interese termini, 132. *Mine*, I. 1. 331, *Lease*, I.

V. Changes in the holding.

Effect of lease of minerals for 99 years to two, one of whom is already tenant of surface, not excepting minerals, from year to year, 132. *Mine*, I. 1.

VI. Estoppels between.

As to encroachments on the waste, 349. *Encroachment*, I. 1.

VII. Tenancy from year to year.

Repairs, 845. *Post*, IX.

VIII. Rent.

Distinction between its being due and its being in arrear, 564. *Distress*, III. 1.

IX. Repairs.

Landlord when not bound to repair on tenancy from year to year.

Count by tenant, from year to year, of a house, against his landlord, for neglecting to do substantial repairs to the premises after notice that they were in a dangerous state; per quod the premises during the tenancy fell and injured plaintiff's goods. Demurrer.

Held: That the declaration was bad in substance: no obligation to do substantial repairs on notice being implied by law from the relation of landlord and tenant. *Gott v. Gandy*, 846.

X. Landlord's remedies.

1. Seizure of goods fraudulently removed to avoid distress for rent, 564. *Distress*, III.
2. Plaint in the County Court to recover possession, where the rent or annual value is under 50*l.*, 669. *County Court*, IV.

XI. Notice to quit.

Proof of service: declarations of deceased agent, 933. *Evidence*, V.

XII. See also *Lease*.

LAND TAX.

By what statutes the assessments of the quotas are regulated.

The duty of the Commissioners of land tax, in assessing the contributions by the several parishes within a Division, is regulated, not by stat. 38 *G. 3. c. 5. s. 8.*, but by stat. 38 *G. 3. c. 60. s. 74.* (reenacted by stat. 42 *G. 3. c. 116. s. 180.*), which treats the quota payable by each parish towards making up the amount charged on the Division as permanent at its then proportion to the other parishes of the Division.

And this is not altered by any later enactment.

Where, therefore, such quota had, up to the year 1852, been unchanged for 150 years, it was held that the Commissioners were right in continuing the assessment for that year at such quota, although the result was that an unequal poundage was levied in the several parishes. *Regina v. Land Tax Commissioners*, 694.

LEASE.

I. Estate of lessor.

Lease by remainderman: estate taken by grantee.

Where a party, entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested estate carved out of the remainder; stat. 4 *Ann. c. 16. s. 9.* making the conveyance as effectual as if attornment had been made by the tenant of the particular estate. *Doe dem. Agar v. Brown, 331.*

II. Entry.

When not necessary, 331. *Ante, I.*

III. Attornment.

By tenant of particular estate, 331. *Ante, I.*

IV. Particular instances.

1. Of copyhold, 132. *Mine, I. 1.*
2. Lease of minerals to joint tenants, 132. *Mine, I. 1.*

LEGACY.

When it may be recovered in the County Court, 573. *County Court, I.*

LIABILITY.

Limitation of by notice, 750. *Carrier, I.*

LIBERTY.

- I. Jurisdiction of county justices as to offences committed in liberties, 580. *Assault, I. 1.*
- II. Commitments to liberty gaol, 580. *Assault, I. 1.*
- III. Franchises of dissolved abbeys, how held by the Crown, 580. *Assault, I. 1.*

LICENSE.

Innkeeper's, 447. *Innkeeper.*

LIMITATION.

- I. Of right of entry: stat. 3 & 4 *W. 4. c. 27.*
1. The twenty years possession broken by a resumption by the lessor at will.

Before the passing of stat. 3 & 4 *W. 4. c. 27.*, *R.* was let into possession of land as tenant at will to *S.* He never paid rent. After the statute passed, and before twenty one years had elapsed from *R.* being so let into possession, *S.* entered and turned *R.* out. *R.* immediately afterwards resumed possession; but no fresh tenancy at will commenced; and he paid no rent.

Held: that *S.* might enter, at any time before the lapse of twenty years from such resumption of possession by *R.*, though after the lapse of twenty one years from the first letting *R.* into possession; and was not barred by sects. 2, 7, 10. *Randall v. Stevens, 641.*

2. When the right of entry on a mine accrues, 132. *Mine, I. 1.*

II. In practice.

Reasonable time, 206, 213. *Costs, II. 1. 3.*

III. Of remainders, 27. *Devise, I. 970. Estate, I.*

LONDON.

Foreign Attachment.

Equitable title: residence of parties.

In an action of debt by *W.* against *D.*, *D.* pleaded that the debt had been attached in the hands of *D.* as garnishee in a plaint of debt in the court of the Mayor and aldermen of the city of *London* by *C.* against *W.* Replication: that the alleged debt sued for in the Mayor's court did not arise or accrue within the jurisdiction of that court, nor had that court had at any time jurisdiction thereof.

Held, on demurrer, a bad replication.

- The custom of foreign attachment in the said court does not apply to debts, the beneficial interest of which is vested in a person other than the defendant sued in such court, whereof the garnishee has notice; and such debts are not attachable under the custom

So certified by that court through the Recorder, and held a good custom by this Court upon demurrer. *Westoby v. Day*, 605.

LORD'S DAY.

See *Sunday*.

LOTTERY.

See Page 118. *Covenant*, I.

LUNATIC PAUPER.

See *Poor*, XIV.

MAGISTRATE.

See *Justice of the Peace*.

MALICE.

Malicious procurement of breach of contract, 216. *Action*, I. 2.

MANDAMUS.

I. When refused.

When obedience may expose the party to an action, 196. *County Court*, VI. 3.

II. Mandatory part of the writ.

Effect of part of the command being unfounded in fact.

Mandamus to a Railway Company whose special Act incorporated the General Acts of 1845. The writ suggested that there was a street and "turnpike road" across which the line of the railway was made: that the Company constructed a bridge, on which the said street "and turnpike road" was carried over the line: and that they made the ascent to the bridge with a greater gradient than one foot in thirty. And that the Company deviated vertically more than two feet from the level of the line as shewn on the plans &c., with reference to the datum line: and that

the street was affected by such deviation, which was made without the consent of those who had the controul of the street. The writ then commanded the Company to "make and construct the ascent to the said bridge as by law you are bound to do, and in conformity with the regulations of the Railways Clauses Consolidation Act, 1845," and also to make the levels of the railway as referred to the datum line, and any deviation therefrom in conformity with the regulations of the Railways Clauses Consolidation Act, 1845.

Return, inter alia: That the street was not a turnpike road; that defendants had not deviated; that the street was not affected by such deviation; and that defendants had made the ascent as by law they were bound to do. Each of those allegations was traversed separately. Special verdict: that the street was a road of great traffic, but not maintained by tolls, or under the jurisdiction of any Turnpike Trustees: that there was a vertical deviation of more than two feet, and that in consequence it became necessary to erect the bridge higher than would otherwise have been necessary, and that the street was affected thereby: and that the gradient was more than one foot in thirty feet and less than one in twenty.

Held: that the street was not a turnpike road: that therefore the gradient was right, and the part of the writ commanding defendants to make the ascent to the bridge as by law they ought could not be supported, as that part of the command was unfounded.

Held also: that, as part of the command in the writ could not be supported, the writ must fail altogether.

Per Lord Campbell C. J. The proviso in the Railways Clauses Consolidation Act, 1845, s. 16., that in exercise of their powers the Company shall do as little damage as can be, relates to the mode of doing works authorized to be done, but does not regulate what those works shall be. *Regina v. East and West India Docks &c. Railway Company*, 466.

III. To whom.

1. To clerk of county court, 279. *County Court*, VII. 1.
2. Not to a Court of competent jurisdiction to adopt a particular construction, 739. *Debtor*, I.

IV. In particular instances.

1. To rehear insolvent, 192. *County Court*, VI. 1.
2. To issue warrant for apprehension of insolvent not appearing, 196. *County Court*, VI. 3.
3. To issue execution, 279. *County Court*, VII. 1.
4. To justice to adjudicate, 357. *Master and Servant*, I. 1.
5. To make ascent to a bridge, 466. *Ante*, II.
6. To pay rateable proportion of expenses of gaol, 654. *Gaol*, I. 1.
7. To make equal assessment of land tax, 694. *Land Tax*.
8. To admit to copyholds, 924. *Copyhold*, I. 1.

V. When refused.

When obedience may expose the party to an action, 196. *County Court*, VI. 3.

VI. Costs.

On making rule absolute after the litigation is at an end, 475. *Costs*, I. 1.

MANUCAPTOR.

See *Bail*.

MARRIED WOMAN.

See *Baron and Feme*.

MASTER AND SERVANT.

I. Contract of hiring and service.

1. Mutuality: implied agreement to find employment.

MASTER AND SERVANT.

W., by written agreement, in consideration of *3l.* advanced to him by *G.* at the time of execution, and the wages agreed to be paid to him by *G.*, agreed to work for and serve *G.* as a tin-plate-worker, and to serve no one else without *G.*'s consent in writing for twelve months, and also until the expiration of three months after notice by *W.* to *G.* of his desire to determine the service; and *W.* agreed to fulfil his said service, and not to absent himself during customary hours of work; and *G.*, in consideration of *W.*'s services, agreed to pay *W.* on *Saturday* in every week during the aforesaid term such wages as articles made by *W.* should amount to at their usual workmen's prices. Proviso that, if after the expiration of twelve months either party should give to the other three months' notice of desire to determine the service, the service should cease and the agreement be void after the expiration of the time mentioned in the notice. And *W.* authorized *G.* to deduct *2s.* per week until the loan of *3l.* should be paid.

Held: that the agreement shewed liability on the part of *G.* to provide *W.* with work so long as the service continued, and was not void for want of mutuality, and might be enforced under stat. 4 *G.* 4. c. 54. s. 3.

And, the magistrates having refused to adjudicate, this Court made absolute a rule ordering them to adjudicate. *Regina v. Welch*, 357.

2. Hiring by a corporation, when it need not be under seal, 822. *Carrier*, II.

II. Executory contract.

1. Breach by renunciation before the time for executing it, 678. *Contract*, IV. 1.
2. How long a party is bound to hold himself open to execute, 678. *Contract*, IV. 1.

III. Liability for acts of servant.

1. Liability of employer for act of contractor's servant where the employment is illegal, 767. *Contractor*.

2. Liability of company for refusal by their officer to deliver goods carried by them, 822. *Carrier*, II.

IV. Authority of servant.

1. To do acts within scope of business, 822. *Carrier*, II.
2. To accommodate customers, 822. *Carrier*, II.

V. Seduction of servants.

1. Action for, not limited to strict relation of master and servant, 216. *Action*, I. 2.
2. Statute of labourers, 216. *Action*, I. 2.
3. Seduction of dramatic performer, 216. *Action*, I. 2.

VI. Stat. 4 G. 4. c. 34. s. 3.

1. Commitment bad as not shewing an offence within the act.

A commitment of a servant, under stat. 4 G. 4. c. 34. s. 3., for absenting himself need not set forth the evidence on which the conviction proceeded.

But it must shew on the face of it that the prisoner has been convicted of what is an offence within the Act.

It is therefore not sufficient that it shews that the servant absented himself without assigning any sufficient reason. *Geswood's case*, 952.

2. The commitment need not set forth the evidence, 982. *Ante*, 1.
3. What contracts may be enforced under this enactment, 357. *Ante*, I. 1.

MASTER OF SHIP.

See Page 301. *Shipping*.

MAXIMS.

- I. Quodlibet accessorium sequitur naturam sui principalis, 176. *Bankrupt*, III.
II. Contemporanea expositio est optima, 427, 428 n. *Charter*, II. 1. V. 1.

- III. Omnia presumuntur rite esse acta, 809. *Poor*, IX. 1.

- IV. Expressio unius est exclusio alterius, 809, 820. *Poor*, IX. 1. 856, *Charter*, I.

MEASURES.

See *Weights and Measures*.

MEMORANDUM.

- I. Of promotions, 716.
II. Of service of notice, 933. *Evidence*, V.

MINE.

I. Possession of.

1. Passes with the surface, when not excepted.

A close, held by copyhold tenure, contained an unopened coal mine. *B.* was tenant, from year to year, of the close to the copyholder in fee: *B.* in fact occupied the surface; and it did not appear that in the demise to *B.* there had been any exception or reservation of the mine. While *B.* was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to *B.* and *P.* In 1832 *B.*'s tenancy from year to year ceased. Held that, before and at the time of the grant of 1821, *B.* was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine: that he therefore, by the grant, became possessed of the mine for the term without actual entry; and that his possession enured to the benefit both of himself and *P.*; and therefore *B.* and *P.* were both possessed of the mine from the time of the grant, and had not a bare interesse termini.

In 1847, the assignee of *B.* and *P.*'s term entered upon and worked the mine: upon which the copyholder in fee brought trespass.

Held: that the assignee was entitled to a verdict upon an issue on a plea that the close was not plaintiff's.

The assignee also pleaded the grant specially, and justified entering under it. The plaintiff replied that the right of entry had not accrued within twenty years, under stat. 3 & 4 W. 4. c. 27.; which the defendant traversed. Held that, upon this issue also, the defendant was entitled to the verdict. *Keyse v. Powell*, 132.

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The town-clerk is not entitled to charge the overseers of parishes for the duties which he performs in respect of the registration of parliamentary voters of a borough, under stat. 6 & 7 *Vict. c.* 18. By sect. 55 the parish officers are to repay to him his "expences incurred;" but these words apply only to such moneys as he has properly expended, not to remuneration for his labour. *Regina v. Hull, Governors of the Poor*, 182.

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A patentee, describing his invention in the specification, is to be taken to claim, as part of his invention, all which he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. In an action by a patentee of certain improvements in machinery in raising and impelling water, issues were taken on the plaintiff being the first inventor, and on the novelty of the invention. The specification described a machine in which water was raised and impelled by the action of centrifugal force, through the revolution of a hollow wheel, revolving in manner therein described. The specification did not shew clearly that the wheel was itself not claimed as part of the invention. On the trial, it appeared that the raising of water by centrifugal force acting through the revolution of a hollow wheel was previously known; but there was evidence that the manner in which, in the plaintiff's machine, it revolved was new. The learned Judge directed a verdict for the defendant on the two issues on the novelty.

Held, that for the reason above stated the direction was right, as the claim must be taken to include the wheel. *Tetley v. Easton*, 956.

2. Material parts old, and not distinguished as being so, 956. *Ante*, I.

II. Assignment.

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The specification of a patent for improvements in wheels described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron, by means of welding pieces of wrought iron together so as to form the rim, spoke and nave into one compact mass.

Defendants used a wheel made by welding pieces of wrought iron together so as to form a single compact piece of wrought iron: the mode of forming the nave was the same as that in the specification; the mode of forming the rim was different.

Held that, it appearing that the mode of forming the nave was a material, new and useful part of the invention, the use of it by defendants was an infringement of the patent, although, in the specification, after describing the whole structure, the invention was stated to consist in the circumstance of the centre, boss or nave, arms and rim, of the wheel being wholly composed of wrought iron welded into one solid mass "in manner hereinbefore described."

Where *A.* and *B.* are tenants in common of a patent assigned to them, if *B.* dies, actions for infringements committed in *B.*'s lifetime survive to *A.*, who is entitled at law to recover the whole damages. *Smith v. The London and North Western Railway Company*, 69.

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I. Poor Law Commissioners' Rules.

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Power to disallow and surcharge notwithstanding a local act.

By a local and personal Act (6 G. 4. c. clxxv.) provision was made for electing governors and directors for the relief of the poor and for the watching and lighting of a district, consisting of one parish and part of another; and the governors and directors were empowered to elect auditors for the purpose of auditing the accounts of the district. The governors and directors were empowered to make rules for the application of moneys to be raised under the Act; to bring or defend actions affecting the property vested in them under the Act, or relating to the due execution of the Act; and to meet and ascertain the amount necessary to be assessed for the purposes of the Act, which amount the inhabitants were to raise by rate. The governors and directors were also empowered to appoint a clerk, and to make such allowance to him and their other officers as they should think proper. Auditors were also to be elected by the inhabitants, who were to meet half yearly, at least, and were empowered to appeal against any part of the accounts of which they should disapprove. After the passing of this Act, the Poor Law Commis-

sioners included the district within one of several unions comprised in the *N.W.M.* District, for which last district they appointed an auditor under stat. 7 & 8 *Vict. c. 101. s. 32.* The last mentioned auditor disallowed part of a bill of costs, paid by the governors and directors to their clerk, and surcharged three of the governors and directors with the amount disallowed.

Held, that he had power so to disallow and surcharge, notwithstanding the provisions of the local Act. *Regina v. Tyrokhitt*, 77.

III. Audit district.

Where part of the district is under a local act, 77. *Ante*, II.

IV. Rateable property : statutory appropriation to public purposes.

Liability to poor rate when not excluded.

The Trustees of *Birkenhead Docks* are empowered, by statute, to take lands by purchase, &c., to construct works, to resell or lease land not wanted, to impose, within a certain amount, such rates for vessels using their dock as they may think proper, and to vary these rates, and to lease their wharfs, quays, &c. They are also empowered to borrow money on security of the rates. *All* sums received from rates, or the sale or rents of land, are to be laid out by them in defraying the costs of the works, paying officers and servants, carrying the Act into execution, and paying the interest and principal of moneys borrowed.

Held : that they were rateable to the poor in respect of their premises :

For that, assuming that the purposes to which all the sums are appropriated by the statute are public, still it did not appear that the rates must be kept down so as only to meet such appropriation ; and therefore it could not be considered that the Legislature had absolutely disposed of all the profits to purposes other than the poor-rate, or that the poor-rate might not properly be paid before ascertaining the sum which would be wanted for such other purposes. *Birkenhead Dock Trustees v. Birkenhead Overseers*, 148.

V. Beneficial occupation : public purposes.

1. Model School, occupied for public purposes.

Lands were purchased by the Lords Commissioners of Her Majesty's Treasury on behalf of the Lords of the Committee of Council on Education, for the purpose of establishing a normal and model school, and were conveyed to a trustee for them. The premises were occupied as a normal school. A Principal and masters were appointed, who resided on the premises. Part of the lands were let ; and the proceeds, together with annual payments from the scholars, were carried to the general funds of the school, but were not sufficient to defray the expences ; and the deficiency was made good by the Committee of Council out of the money voted by Parliament for the promotion of public education.

Held : that the premises were liable to the poor rate, as there was a beneficial occupation : and that, though the premises were occupied for a public purpose, and the expences were defrayed out of the public revenue, those circumstances did not afford a ground of exemption. *Regina v. Temple*, 160.

2. Occupation by trustees for public purposes, 148. *Ante*, IV.

3. Expences partly paid by public, 160. *Ante*, 1.

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VIII. Settlement : wife and unemancipated children.

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IX. Settlement by apprenticeship.

1. Presumption of compliance with the Poor Law Commissioners' Rules.

By Rules of the Poor Law Commissioners under stat. 4 & 5 W. 4. c. 76. s. 15. and 7 & 8 Vict. c. 101. s. 12., respecting the binding of poor children apprentices, it was ordered: That no child should be bound who could not write his own name; That no person above the age of fourteen should be bound without his consent; That no child under the age of sixteen should be bound without the consent of his father, or, if his father was dead, or disqualified (as after specified) to consent, or if the child should be a bastard, without the mother's consent, if living; and then disqualifications of the parent were specified; and, in the case of the mother being so disqualified, no consent was to be required; That the indenture should be executed in duplicate by the master and guardians (or person authorized to do so), and should not be valid unless signed by the apprentice without aid in the presence of the guardians, and the consent of the parent, where requisite, should be testified by the parent's signature or mark, and, where such consent was dispensed with (as above provided), the cause should be stated at the foot of the indenture; That any justice ordering or allowing the binding should certify, at the foot of the indenture, that he had ascertained that the rules had been complied with.

Held: 1. That these Rules, excepting that as to the signature by the apprentice, were directory only, and non-compliance with them did not make the indenture void.

2. That the apprentice's consent, though he be above the age of fourteen, need not appear on the face of the indenture otherwise than by his signing.

3. That the fact of such consent would be assumed in default of proof of non-consent, both from the ordinary presumption that all things were duly performed, and from that arising from the justice's certificate at the foot of the indenture.

4. That, in default of proof to the contrary, the execution of the inden-

ture in duplicate would be assumed from the same presumptions.

5. That, no consent of the parents, or ground of dispensation, appearing on the indenture, it would be assumed that both were dead, and so no consent or dispensation requisite, from the same presumptions.

So held, on an appeal against a removal founded upon a settlement gained under the indenture. *Regina v. St. Mary Magdalen, Bermondsey*, 809.

2. Presumption of proper consents, 809. *Ante*, 1.

3. Burthen of proof, 809. *Ante*, 1.

X. Settlement by estate.

Extinction by ceasing to inhabit within ten miles: desertion of family.

If a man settled in a parish by estate, ceases to inhabit within ten miles, and so loses his settlement there, under sect. 68 of stat. 4 & 5 W. 4. c. 76., his wife and unemancipated children must follow his settlement. If he have none, or none known, they nevertheless cannot be removed to such parish.

So held, in a case where the man had deserted the wife and children, and could not be found. *Regina v. Llansaintfraid*, 803.

XI. Removeability: five years' residence.

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XII. Removeability: members of family.

Unemancipated child after break in residence by father.

F. resided with her father and as part of his family in the parish of *B.* until, being then under the age of sixteen, she was, in 1847, taken into the workhouse of *B.*, and remained there receiving relief from *B.* till 1852. At this time the father was settled in *A.*: but, having resided in *B.* for more than five years, was irremovable from *B.* In 1848, *F.*, being still in the workhouse, attained sixteen. In 1849, *F.*'s father quitted the parish of *B.* In 1852, *F.* became lunatic, and was

removed from the workhouse of *B.* to a lunatic asylum. On appeal against an order of two justices, on the guardians of the Union comprising *A.*, to pay to the guardians of the Union comprising *B.* the expenses of the lunatic, the Sessions confirmed the order, subject to a case stating the above facts.

Held: that *F.*, being unemancipated and an infant, though above sixteen, had the same status of removeability as her father; and that, he having quitted *B.* in 1849, she then ceased to be irremovable under stat. 9 & 10 *Vict. c. 66. s. 1.*; and the order was confirmed. *Regina v. St. Ann, Blackfriars*, 440.

XIII. Suspended order: costs.

Objection of irremovability how available.

An order of removal was suspended; but afterwards, the pauper having died, the suspension was taken off, and an order was made for costs, under stat. 35 *G. 3. c. 101. s. 2.*, upon the parish to which the removal had been made. Neither order was appealed against. After the time for appeal had expired, application was made to a magistrate for a distress warrant, the costs having been demanded and not paid. On the hearing, it was objected that, since the expiration of the time, the parish, to which the removal was ordered, had discovered that there had been a five years' residence in the removing parish, under stat. 9 & 10 *Vict. c. 66.* The magistrate, on this objection, refused the distress warrant.

Held, that he was bound to issue it, the objection, if valid, being one which could be taken only by appeal against the order for costs. *Re Williams*, 84.

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The proviso in sect. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63., that, if any kind of property before the passing of the Act has been exempt from rating by any Local Act, in respect of purposes for which district rates may be levied under the Public Health Act, 1848, the same kind of property, in respect of the same purposes, and to the same extent, shall be exempt from district rates under the last mentioned Act), applies only to exemptions in respect of the nature of the property. Not, therefore, to property exempt, under a local Act, in respect merely of its locality. Although the property, so locally situate, was exempt from poor rate. *Tait v. Carlisle Local Board of Health*, 492.

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III. Railways joining each other: regulations by arbitration.

1. Speed and number of trains.

Declaration by the *U. Railway Company* against the *C. Railway Company*, stated that the plaintiffs were proprietors of and carriers over the *U. Railway*, and defendants of and over a railway from *London to Colchester* (the *C. Railway*): that the railways joined at *Colchester*; that differences had arisen between plaintiffs and defendants as to what arrangements should be made by them, respectively, for affording proper facilities, conveniences and accommodation for the interchange and transmission of traffic from one railway to, upon and along the other: that by statute it was enacted that, if plaintiffs or defendants should so require, within fourteen days after notice, it should be referred to arbitration, in the manner provided by The Companies

Clauses Consolidation Act, 1846, with respect to settlement of disputes by arbitration, to determine what arrangements should be made by plaintiffs and defendants, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods, to be conveyed from the *U. Railway*, or any part thereof, upon and along the *C. Railway*, between *London* and *Colchester* or any part thereof, and from the *C. Railway* between *London* and *Colchester* or any part thereof, and upon and along the *U. Railway*, or any part thereof; and to determine the terms and conditions on which such use, conveyance and accommodation should be afforded; and generally to determine all matters incident to the arrangements before mentioned, or which might be necessary or expedient for giving effect to the same: and that it should be competent for the arbitrators to order and direct plaintiffs and defendants to do all such acts as might be necessary and expedient for carrying the arrangements into effect, and to determine that, for each default, the Company in default should pay to the other such sum, by way of liquidated damages, as the arbitrators might appoint: such damages, if above 50*l.*, to be recoverable in any Court of competent jurisdiction: provided that neither Company should be authorized to run locomotives on the line of the other.

Held that the arbitrators had power to order:

1. That the defendants should run every day, except *Sundays*, an express train from the *Colchester Junction* to their *London* station, departing at 10 A.M. and arriving at half past 11 A.M., stopping at three intermediate stations; which was admitted to be a speed of thirty six miles per hour. For that the times of departure and arrival were circumstances which properly made part of the arrangement, and the Court could not intend that the speed was improper, in the absence of any allegation to that effect. And that it was no objection that the award did not limit the time during which

the arrangement was to continue, as new regulations might be made, under the arbitration clause, from time to time.

2. That the defendants should run an express train, with specified times of departure and arrival, from their *London* station to the *Colchester Junction*.

3. That the defendants should convey, from the *U. Railway*, on the *C. Railway*, the carriages and luggage vans, which had been used on the *U. Railway* for the passengers brought thereon to *Colchester*, to *London* for the conveyance of such passengers and their luggage.

So held, upon demurrer, to a declaration for the liquidated damages for non-compliance with the above orders. *Eastern Union Railway Company v. Eastern Counties Railway Company*, 630.

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Stat. 32 G. 3. c. 74. s. 14., exempting coasting vessels from paying the dues to *Ramsgate Harbour* in respect of more than one voyage in the year, includes coasting vessels carrying only coal. *Moore v. Shepherd*, 382.

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Plaintiff supplied new running rigging to the ship *P.*, then lying in dock, on the order of *T.*, who was on board and acting as her master. This

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On these facts the case was left to the jury, who found for the plaintiff.

Held: that there was evidence, under these circumstances, to go to the jury that the plaintiff supplied the new running rigging on the credit of the defendant, and that defendant had given *T.* authority to pledge defendant's credit for the rigging so supplied.

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- I. Contract as to quantity.

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A written contract was made for the purchase of "the cargo" of the *P.* "now at *Queenstown*, as it stands, consisting of about 1300 quarters *Ibraila* Indian corn, at the price of 30s. per impl. quarter," cost, freight and insurance to a safe port in the U. K., "the quantity to be taken from the bill of lading, and measure calculated at 220 qrs. = 100 kilos. Payment cash, on handing shipping documents." The bill of lading expressed that, at *Ibraila*, were shipped in good condition on board the *P.*, bound to *Queenstown* for orders, 758 kilos. deliverable to *Z.* or assigns, he or they paying freight according to charter-party. "Quantity and quality unknown to" the master. A few days after the making of the contract, the shipping documents, including this bill of lading, were sent in by the vendor, with an invoice debiting the purchaser with the price of the number of quarters in 758 kilos. (at the rate of 100 kilos. = 220 qrs.) at 30s. per quarter, and crediting him with freight on the same number of quarters at 10s. 3d. The purchaser paid the balance, and

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ordered the *P.* to *D.*, where she delivered her cargo. On the delivery, the actual number of quarters proved to be less than that calculated from the bill of lading. The purchaser paid freight on the actual quantity only, at 10s. 3d. per quarter; and claimed to recover back from the vendor 19s. 9d. per quarter for the short delivery, as an overpayment.

Held: that the construction of the contract was, that the parties agreed to buy and sell the cargo at a price to be calculated from the quantity stated in the bill of lading, and not to depend upon the actual quantity; and that the purchaser took the chance of the actual quantity turning out more, or the risk of its turning out less, than the stated quantity; and consequently that he could not recover for short delivery. *Covas v. Bingham*, 836.

- II. Delivery and acceptance within statute of frauds.

1. Delivery to carrier: inaction of vendee.

Goods, of above the value of 10l., were verbally ordered to be shipped consigned to *The A. Co.* at *Liverpool*. *The A. Co.* were carriers by inland navigation to the residence of the vendee. The goods were shipped on board the *M.*, a vessel selected by the vendor; a bill of lading was signed, making the goods deliverable to *The A. Co.* at *Liverpool*, and was forwarded to them; of all which the vendee had notice, and did and said nothing. Then the goods perished at sea on their voyage to *Liverpool*; and the vendee refused to have any thing to do with them. The above facts being proved in an action for goods sold, and delivered, leave was reserved to enter a verdict for plaintiff, if these facts were evidence on which the jury would have been justified in finding an acceptance and receipt within sect. 17 of the Statute of Frauds.

Held. 1. That the shipment on board a vessel selected by the vendor and the signature of a bill of lading making the goods deliverable to the vendee's agent, though a sufficient delivery to support an action for goods

sold and delivered, was not sufficient to bind the contract. 2. That the receipt of the bill of lading by *The A. Co.* (they being carriers only), and the non-feasance of the vendee on hearing that the goods had been shipped, were not, under the circumstances, sufficient evidence to justify the jury in finding a verdict for the plaintiff. *Semble*: That the acceptance and retention of a bill of lading, by the consignee, may be equivalent to an actual receipt of the goods. *Meredith v. Meigh*, 364.

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